RECORD, CASE No. 13,588.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 59.

HARLAN P. LLOYD, TRUSTEE OF EDWARD L. HARPER, ET AL., APPELLANTS,

vs.

EMMA C. PRESTON, EXECUTRIX OF JOSIAH W. PRESTON, DECEASED, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JULY 24, 1889.

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1 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, O., in said district, on the first Tuesday of April, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and thirteenth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

JOSIAH W. PRESTON *et al.*, Complainants,
against
THE CINCINNATI, COLUMBUS & HOCKING VALLEY RAILROAD COMPANY *et al.*, Defendants.
} In Chancery. # 3718.

Be it remembered that heretofore, to wit, on the 5th day of
2 January, A. D. 1885, came the complainants, by their solicitors, and filed in the clerk's office of said court their certain bill of complaint herein, clothed in the words and figures following, to wit:

Bill of Complaint.

Circuit Court of the United States for the Southern District of Ohio, Western Division.

To the judges of the circuit court of the United States for the southern district of Ohio, western division:

Josiah W. Preston, Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, William T. Baker, Murray Nelson, Abram Poole, Almore A. Kent, Selah Young, Jr., and James S. Sherman, who are citizens of the State of Illinois and residents of the city of Chicago, in said State, bring this their bill against the Cincinnati, Columbus and Hocking Valley Railway Company, a corporation existing under the laws of the State of Ohio; E. L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, and Lewis Seasongood, residing in the city of Cincinnati; W. D. Lee, residing in the city of Newark; John E. Gimperling, residing in the city of Dayton, who are citizens of the State of Ohio, and George E. Clymer, who is a citizen of the State of Kentucky, residing at Newport, in said State.

And thereupon your said orator-, Josiah W. Preston and Eugene H. Lahee, complain and say that at the October term, A. D.
3 1884, of this court, to wit, on the 20th day of November, A. D. 1884, the same being one of the regular days of said term, your orators, the said Josiah W. Preston and Eugene H. Lahee, recovered a judgment against the said Cincinnati, Columbus and Hocking Valley Railway Company, one of the defendants herein,

for the sum of one hundred and four thousand four hundred and seventy-seven ($104,477.22) dollars and twenty-two cents for the damages, costs, and charges your orators, the said Preston and the said Lahee, had sustained in and about the said suit — in that behalf expended, as by the record of said judgment in the office of the circuit clerk of your said court will more fully appear, and to which for greater certainty your orators pray leave to refer.

And your orators, the said Preston and the said Lahee, further represent that the said judgment so recovered as aforesaid remains in ful- force and effect, and, the damages aforesaid being unpaid and unsatisfied, your orators, the said Preston and the said Lahee, on or about the 26th day of November, A. D. 1884, for the purpose of obtaining satisfaction of the said judgment, sued and procecured out of your said court a writ of *fieri facias*, directed to the marshal in and for the southern district o- Ohio, that being the district in which the said defendant railway company was located and has its principal office at the time of issuing said writ, by which said writ the said marshal was commanded that of the goods, chattels, lands, and tenements of the said defendant situated within his said district
4 he cause to be made the sum of one hundred and four th-usand and four hundred and seventy-seven dollars and twenty-two cents, which your said orators, Preston and Lahee, in your said court had recovered against the said Cincinnati, Columbus and Hocking Valley Railway Co., defendant herein, and that he should have the money at the clerk's office of said court, at the city of Cincinnati, in said district, within ninety days from the date thereof, to satisfy the judgment so recovered by your orators last aforesaid, and that he should have then and there that writ.

And your orators Preston and Lahee further show that the said writ of *fieri facias*, before the delivery thereof to said marshal, was duly indorsed and was afterwards, on or about the 26th day of November, A. D. 1884, delivered to the said marshal to be executed in due form of law.

And your said orators last named further show that the said marshal, on the 19th day of December, A. D. 1884, returned on the said writ to him in that behalf directed and delivered as aforesaid that "I received this writ Nov. 26, 1884, and, not being able to find any goods or chattels, lands or tenements of the within-named defendant whereon to levy, I hereby return the same unsatisfied."

As by the said writ of *fieri facias* and the return of said marshal endorsed thereon as aforesaid, now on file in the office of the circuit clerk of this court, will more fully appear, and to which or
5 a copy thereof your orators pray leave to refer.

And your orators, the said Preston and Lahee, further show that no part of said judgment or costs have been paid, but that the same still remains in full force and effect, being neither reversed, paid, satisfied, or otherwise vacated, and that the said defendant, The Cincinnati, Columbus and Hocking Valley Railway Co., has not paid the same nor any part thereof to your orators last aforesaid, but have hitherto wholly neglected and refused so to do.

And your orators Josiah W. Preston and Eugene H. Lahee fur-

ther aver that there is now actually, legally, and equitably due to your orators upon the judgment aforesaid the full sum of one hundred and four thousand four hundred and seventy-seven dollars and twenty-two cents, together with interest thereon from the 7th day of October, A. D. 1884, and that neither the said defendant, The Cincinnati, Columbus and Hocking Valley Railway Co., nor any or either of the other persons named as defendants to this bill of complaint have any claim or demand of any nature or kind whatsoever against said judgment by way of set-off or otherwise.

And your orator William E. McHenry, complaining, says that at the October term, A. D. 1884, of this honorable court, on the twentieth day of Nov., the same being one of the regular days of said term, he recovered a judgment against the said The Cincinnati, Columbus and Hocking Valley Railway Co., defendant herein, for the
6 sum of forty-five thousand eight hundred and thirty-seven dollars and ($45,887.21) *and* twenty-one cents for the damages, costs, and charges which your orator, the said McHenry, had sustained in and about said suit — in that behalf expended, as by the record of said judgment in the office of the circuit clerk of this court will more fully appear, and to which for greater certainty your said orator prays leave to refer.

And your orator, the said William E. McHenry, further represents unto your honors that the said judgment so recovered as aforesaid remains in full force and effect, and; the damages aforesaid being unpaid and unsatisfied, your orator, the said William E. McHenry, on or about the 26th day of November, A. D. 1884, for the purpose of obtaining satisfaction of the said judgment, sued and prosecuted out of your said court a writ of *fieri facias*, directed to the marshal in and for the southern district of Ohio, that being the district in which the said defendant railway Co. was located and had its principal office at the time of issuing said writ, by which said writ the said marshal was commanded that of the goods, chattels, lands, and tenements of the said defendant railway Co. situated within his said district he caused to be made the sum of forty-five thousand eight hundred and thirty-seven dollars and twenty-one cents, which your said orator in your said court had recovered against the said Cincinnati, Columbus and Hocking Valley Railway Co., defendant herein, and that he should have the money at the clerk's office
7 of said court, at the city of Cincinnati, in said district, within ninety days from the date thereof, to satisfy the judgment so recovered by your orator last aforesaid, and that he should have then and there that writ.

And your said orator, William E. McHenry, further shows that the said writ of *fieri facias*, before the delivery thereof to said marshal, was duly endorsed and was afterwards, on or about the 26th day of Nov., A. D. 1884, delivered to the said marshal to be executed in due form of law.

And your said orator last named further shows that the said marshal, on the nineteenth day of December, A. D. 1884, returned on the said writ to him in that behalf directed and delivered as aforesaid that "I receiver this writ Nov. 26, 1884, and, not being

able to find goods or chattels, lands or tenements of the within-named defendant whereon to levy, I hereby return this writ unsatisfied," as by the said writ of *fieri facias* and the return of said marshal endorsed thereon as aforesaid now on file in the office of the circuit clerk of this court will more fully appear, and to which or a copy thereof your said orator prays leave to refer.

And your orator William E. McHenry further represents that no part of said judgment or costs have been paid, but that the same remains in full force and effect, being neither reversed, paid, satisfied, or otherwise vacated, and that the said defendant, The Cincinnati, Columbus and Hocking Valley Railway Co., has not
8 paid the same nor any part thereof to your orator, but has hitherto wholly neglected and refused so to do.

And your orator William E. McHenry further avers that there is now actually, legally, and equitably due to your orator upon the judgment aforesaid the full sum of forty-five thousand and eight hundred and thirty-seven dollars and twenty-one cents, together with interest thereon from the 7th day of October, A. D. 1884, and that neither the said defendant, The Cincinnati, Columbus and Hocking Valley Railway Co., nor any or either of the other persons named as defendants to this bill of complaint have any claim or demand of any nature or kind whatsoever against said judgment by way of set-off or otherwise.

And your orators Charles J. Gilbert, William T. Baker, and Murry Nelson complain *ant* say that at the October term, A. D. 1884, of this court, to wit, on the 20th day of November, A. D. 1884, the same being one of the regular days of said term, your orators last named recovered a judgment against The Cincinnati, Columbus and Hocking Valley Railway Co., defendant herein, for the sum of ninety-eight thousand eight hundred and seventy-six dollars and ($98,876.71) seventy-one cents for the damages, costs, and charges your orators last named had sustained in and about the said suit — in that behalf expended, and which were adjudged to your orators Charles J. Gilbert, Wm. T. Baker, and Murry Nelson by your honorable court, as by the record of said judgment will more fully appear and to which reference is hereby made.

9 And your orators Charles J. Gilbert, William T. Baker, and Murry Nelson further shows that said judgment still remains in full force and effect; that it has neither been paid, reversed, vacated, nor set aside, and that there is now due to your orators last named the full sum of ninety-eight thousand and seventy-six dollars and seventy-one cents; that, the said judgment and damages being still unpaid, your orators, the persons last above named, on the 26th day of November, A. D. 1884, for the purpose of obtaining satisfaction of said judgment, sued out of your said court a writ of *fieri facias*, directed to the marshal of the southern district of Ohio, that being the district in which the said defendant railway Co. had its location and principal office at the time of suing out such writ; that by said writ the said marshal was commanded that of the goods, chattels, lands, and tenements of the said defendant railway Co. be caused to be made the sum of ninety-eight thousand eight

hundred and seventy-six dollars and seventy-one cents, which your orators last named had recovered in this court against the said defendant railway company as aforesaid, and that he should have the money at the clerk's office of said court, at the city of Cincinnati, in said district, within 90 days from the date of said writ, to satisfy the judgment so recovered by your orators last named, and that he should have then and there that writ.

And your said orators, Charles J. Gilbert, William T.
10 Bakar, and Murry Nelson, further show that said writ of *fieri facias* before the delivery thereof to said marshal was duly endorsed, and was thereafter and on or about the 26th day of November, 1884, delivered to said marshal to be executed in due form of law; that said marshal, on the 19th day of December, 1884, returned on said writ:

"I receiver this writ Nov. 26, 1884; not being able to find any goods or chattels, lands or tenements of the within-named defendant whereon to levy, I hereby return the same unsatisfied."

As by the said writ and the return of the marshal endorsed thereon as afore-aid and now on file in the office of the circuit clerk of this court will soon fully appear and to which reference is hereby made.

And your orators Charles J. Gilbert, Wm. T. Baker, and Murry Nelson further say that no part of said judgment and costs have been paid, and that neither the said defendant railway Co. nor any of the other defendants herein have any claim or demand of any nature or kind against said judgment so recovered in favor of your orators last named by way of set-off or otherwise, but that the whole amount thereof, together with the costs, damages, and interest thereon from October 7, A. D. 1884, is still justly and equitably due and owing to your orators, the said Charles J. Gilbert, William T. Baker, and Murry Nelson; and your orators last named say that neither the said defendant railway Co. nor any of the other defendants herein

have paid said said judgment, nor have any of the said de-
11 fendants applied for that purpose any property, money, credits, debts, equitable assets, or things in action belonging to the said defendant railway Co., as in equity and good conscience should have been done by said defendants and as they were and are legally and equitably bound to do.

And your orators Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, compla-ning, say that at the October term, A. D. 1884, of this honorable court, on the 20th day of Nov., 1884, the same being one of the regular days of said term, they recovered a judgment against the said The Cincinnati, Columbus and Hocking Valley Railway Co., defendent herein, for the sum of six thousand seven hundred and forty-seven ($6,747.34) dollars and thirty-four cents for the damages, costs, and charges *for* which your orators last named had sustained in and about the said suit — in that behalf expended, and which were adjudged to your orators Elmore A. Kent, Selah Young, Jr., and James S. Sherman by this court, as by the record of said judgment will more fully appear and to which reference is thereto made.

And your orators James S. Sherman, Elmore A. Kent, Selah Young, Jr., and Abram Poole, further complaining, show that said judgment still remains in full force and effect; that it has neither been paid, reversed, vacated, nor set aside, and that there is
12 now due to your orators last named the full sum of six thousand seven hundred and forty-seven dollars and thirty-four cents; that, the said judgment and damages being still unpaid, your orators, the persons last-above named, on the 26th day of November, A. D. 1884, for the purpose of obtaining satisfaction of said judgment, sued out of your said court a writ of *fieri facias*, directed to the marshall for the southern district of Ohio, that being the district in which the said defendant railway Co. had its location and principal office at the time of suing out such writ; that by said writ the said marshal was commanded that of the goods, chattels, lands, and tenements of the said railway Co. be caused to be made the sum of six thousand seven hundred and forty-seven dollars and thirty-four cents, which your orators last named had recovered in this court against the said defendant railway Co. as aforesaid, and that he should have the money at the clerk's office of said court, at the city of Cincinnati, in said district, within ninety days from the date of said writ, to satisfy the judgment so recovered by your orators last named, and that he should have then and there that writ.

And your orators, Abram Poole and James S. Sherman, further show that said writ of *fieri facias*, before the delivery thereof to said marshal, was duly endorsed and was thereafter and on or about the 26th day of November, A. D. 1884, delivered to said marshal to be executed in due form of law; that said marshal, on the 19th dau of December, returned on said writ that "I received this writ
13 Nov. 26, 1884, and, not being able to find any goods or chattels, lands, tenements of the within-named defendant whereon to levy, I hereby return the same unsatisfied," as by the said writ and the return of the marshal endorsed thereon as aforesaid, and now on file in the office of the circuit clerk of this court, will more fully appear and to which reference is hereby made.

And your orators Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman further say that no part of said judgment and costs have been paid, and that neither the said defendant railway Co. nor any of the other defendants herein have any claim or demand of any nature or kind against said judgment so recovered in favor of your orators last named by way of set-off or otherwise, but that *that* the whole amount thereof, together with the costs, damages, and interest thereon from the 7th day of October, A. D. 1884, is still justly and equitably due and owing to your
14 orators, the said Abram Poole, Almore A. Kent, Selah Young, Jr., and James S. Sherman; and your orators last named say that neither the said defendant railway Co. nor any of the other defendants herein have paid said judgment, nor have any of the said defendants applied for that purpose any property, money, credits, debts, equitable assets, or things in action belonging to the said defendant railway Co., as in equity and good conscience should have

been done by said defendants and as they were and are legally and equitably bound to do.

And your orators, further complaining, say that they well hoped that said defendant, The Cincinnati, Columbus and Hocking Valley Railway Co., would have paid to your said orators the full amounts due them respectively upon their said several judgments hereinbefore set forth, or that it would have applied for that purpose any property, money, credits, debts, or other equitable assets or things in action belonging to it, the said defendant railway Co., or in which it was in any way interested and as in equity and good conscience it ought to have done and as it was and *and* is legally and equitably bound to do.

Your orators further show that the said The Cincinnati, Columbus and Hocking Valley Railway Co. was duly organized and incorporated under and by virtue of the laws of Ohio.

Your orators further show that after due notice, to wit, on December 10, 1881, at the city of Cincinnati, State of Ohio, sub-
15 scriptions to the capital stock of the company aforesaid were taken and the following-named persons then became and were subscribers to the stock in the said The Cincinnati, Columbus and Hocking Valley Railway Co., each agreeing to take and pay for stock therein of the amount and number of shares set against their respective names:

E. L. Harper, of Cincinnati, Ohio, 2,500 shares, par value for each	$100
John L. Pfau, of Cincinnati, Ohio, 1 share, par value for each	100
E. Snowden, " " " " "	100
J. H. Matthews, of Cincinnati, Ohio, 1 share, par value for each	100
W. H. Harper, of Cincinnati, Ohio, 1 share, par value for each	100
D. P. Hyatt, " " " " "	100
Wm. C. Herron, " " " " "	100
J. F. Gimperling, of Dayton, Ohio, " " "	100
Geo. E. Clymer, of Newport, Ky., " " "	100

Your orators further show that Lewis Seasongood, of Cincinnati, Ohio, became and was a subscriber to the capital stock of said company and agreed to take and pay for stock therein, but for what number of shares is not known to your orators, and they ask leave to attach a copy of the contract of subscription, together with the list of subscribers to the capital stock thereof, and make it a part of this bill, marked Exhibit (1); and your orators aver that
16 none of the said several subscribers to the capital stock of said corporation have paid any part of the respective subscriptions so by them severally made, all of which is now due and payable and necessary to discharge the indebtedness of said corporation upon the several judgment claims hereinbefore set forth.

Your orators further aver upon information and belief that W. D. Lee, of Newark, Ohio, became and is the holder of certificates representing three thousand shares, of the par value of one hundred dollars each, of the capital stock of said corporation; that said cer-

tificates were issued and delivered by said company to the said W. D. Lee on or about the 1st day of June, 1882, at the special instance and request and for the use and benefit of the said defendant E. L. Harper, and your orator- aver that nothing whatever has been paid to the said company for the said 3,000 shares of stock, certificates for which were so as aforesaid issued to the said W. D. Lee, all of which is now due and payable and necessary to discharge the indebtedness of said corporation upon the several judgment claims herein described.

Your orators further aver and show that said The Cincinnati, Columbus and Hocking Valley Railway Co. is and for a long time has been wholly insolvent; that the officers of said company, viz., the president and general manager, D. P. Hyatt, and the secretary, J. H. Matthews, as well as all the directors of said company, viz., D. P. Hyatt, J. H. Matthews, Geo. E. Clymer, J. L. Pfau, E. Snowden,

17 W. H. Harper, and W. C. Herron, all of whom are defendants herein, were at the time of the organization of said company and ever since have been and still are in the employ of said defendant E. L. Harper and under his control; that, knowing as they do said company to be insolvent, said officers and directors neglect to demand or collect any of the credits due to said corporation as aforesaid; that said corporation has abandoned all action under its charter, and that nothing in the way of enforcing collection of any of the subscriptions and credits due and payable as aforesaid to said company can be accomplished through said company or its said officers and directory.

But now it is, may it please your honors, the said defendants, combining and confederating together and with divers other persons to your orators unknown, but whose names, when discovered, your orators pray may be inserted therein as defendants to this bill of complaint, and contriving how to injure your orators in the premises, neglect and refuse to pay the amount so due to your several orators upon their said several judgments as the same are hereinbefore set forth or to apply for that purpose any property, money, debts, or other equitable interests or things in action belonging to said defendant railway Co., and the said defendants other than the said defendant railway Co. have neglected and refused to pay for the shares of stock in said railway corporation severally subscribed for and agreed by them to be taken and paid for to the said defendant railway Co. or to its legal representative or receiver.

18 All of which actings, doings, neglects, and refusals are contrary to equity and tend to the manifest wrong and injury of your orators in the premises; in tender consideration thereof and forasmuch as your orators, Josiah W. Preston, Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, William T. Baker, Murry Nelson, Elmore A. Kent, Selah Young, Jr., Abram Poole, and James S. Sherman, are remediless in the premises at and by the strict rules of the common law and can have adequate relief only in a court of equity, where matters of this kind are properly cognizable and relieveable—

To the end, therefore, that your orators may have the several

judgments so recovered by them against the said defendant railway corporation as the same are hereinbefore set forth paid and satisfied, your orators respectfully pray that the said E. L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, W. H. Harper, J. E. Gimperling, Lewis Seasongood, Geo. E. Clymer, D. P. Hyatt, and W. P. Herron may be ordered and decreed by the court to pay to your orators the amounts due by said defendants, respectively, by reason of their several subscriptions to the capital stock of said railway company, and that your orators may recover against said defendants and each of them the sums to your orators due, respectively, as aforesaid.

And your orators further pray that the said defendants, E. L. Harper and W. D. Lee, either or both of them, jointly or severally may be ordered, adjudged, and decreed to pay to your orators
19 the amount due by reason of the issue, as hereinbefore set out, of the three thousand shares of the capital stock of the said railway Co. to the said W. D. Lee at the said instance and request and for the benefit and advantage of the said E. L. Harper and the said W. D. Lee, and that your orators may recover said amounts against said last-named defendants.

And may it please your honors to grant unto your orators a writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said The Cincinnati, Columbus and Hocking Valley Railway Co., E. L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, W. H. Harper, John E. Gimperling, Lewis Seasongood, Geo. E. Clymer, D. P. Hyatt, W. C. Herron, and W. L. Lee, thereon and thereby commanding them and each of them, upon a certain day and under penalty to be therein inserted, to personally be and appear before this honorable court and then and there to answer the premises and to stand to and abide by and perform such order and decree therein as to the court shall seem proper.

And may it please your honors to grant unto your orators such further and other relief in the premises as shall be agreeable to equity and good conscience.

WILLIAM T. BAKER,
MURRY NELSON,
ABRAM POOLE,
ELMORE A. KENT,
SELAH YOUNG, JR.,
JOSIAH W. PRESTON,
EUGENE H. LAHEE,
WILLIAM E. McHENRY,
CHARLES J. GILBERT,
JAMES A. SHERMAN,
20 By FRANCIS A. RIDDLE,
Their Solicitor.

FRANCIS A. RIDDLE, AND BOYCE & BOYD, AND PAXTON & WARRINGTON,
Solicitors for Complainants.

United States Circuit Court for the Southern District of Ohio, Western Division.

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COLUMBUS AND H. V. R'Y CO. *et al.* } In Chancery.

Francis A. Riddle, being duly sworn, on his oath says that he is one of the solicitors in the above-entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof to be true, except as to such matters as are therein stated on information and belief, and as to those things he believes them to be true.

FRANCIS A. RIDDLE.

Sworn to before me and subscribed in my presence this 29 day of December, 1884.

EDWIN J. FRANK,
N. P. in and for Ham. Co., O. [SEAL.]

21 EXHIBIT "1."

Subscriptions to the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Co., a corporation under the laws of Ohio.

We, the undersigned, respectively subscribe for and agree to take and to pay for the number of shares of the capital stock of the Cincinnati, Columbus and Hocking Valley Co. set opposite to our respective names:

Name.	Residence.	# of shares.
E. L. Harper	Cincinnati	250
E. L. Harper	"	2,250
John L. Pfau	"	1
E. Snowden	"	1
J. H. Matthews	"	1
W. H. Harper	"	1
J. E. Gimperling	Dayton	1
L. Seasongood	Cincinnati	
Geo. E. Clymer	"	1
W. C. Herron	"	1

22 And afterwards, to wit, on the same day, to wit, there was filed in the clerk's office of said court the following cost bond; said cost bond is clothed in the words and figures following, to wit:

Cost Bond.

In the Circuit Court of the United States for the Southern District of Ohio.

JOSIAH W. PRESTON *et al.*
vs.
THE CIN., COL. & HOCK. VALLEY R'Y CO. *et al.* } No. 3718.

Cost bond.

I hereby acknowledge myself security for costs in this case.
W. C. ELSTNER. [SEAL.]

Taken and acknowledged before me this 5th day of January, 1885.
ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

SOUTHERN DISTRICT OF OHIO, *ss:*

I, William C. Elstner, a resident of said district, do solemnly swear that, after paying my just debts and liabilities, I am worth five thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.
W. C. ELSTNER.

Sworn to and subscribed before me this 5th day of Jan'y, A. D. 1885.
ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

23 And afterwards, to wit, on the 5th day of January, A. D. 1885, there was issued out of the clerk's office of said court our certain subpœna, directed to the marshal of said district and against the said defendant herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon W. D. Lee, residing in the city of Newark, & John E. Gimperling, residing in the city of Dayton, impleaded with others, citizen- of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against him by Josiah W. Preston *et al.*, citizens of and resident in the State of Illinois.

Hereof you are not to fail, under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of January, A. D. 1885, and in [SEAL.] the 109 year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.*

24 *Memorandum.*

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of February, 1885; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

(Endorsed thereon:) W. C. Elstner acknowledges himself security for *for* all costs for which the plaintiff may be liable in this case.

25 And afterwards, to wit, on the 5th day of January, A. D. 1885, there was issued out of the clerk's office of said court our certain subpœna directed to the marshal of said district and against the said defendant herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon Geo. E. Clymer, impleaded with others, citizen of and resident in the State of Kentucky, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against him by Josiah W. Preston *et al.*, citizens of and resident in the State of Illinois.

Hereof you are not to fail, under the penalty of the law thence ensuing

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of [SEAL.] the United States, this 5th day of January, A. D. 1885, and in the 109 year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.*

26 *Memorandum.*

The said defendants are required to enter their appearance in this

suit in the clerk's office of said court on or before the first Monday of February, 1885; otherwise the said bill may be taken *pro confesso*.

B. R. COWEN, *Clerk*.

(Endorsed thereon:) W. C. Elstner acknowledges himself security for *for* all costs for which the plaintiff may be liable in this case.

27 And afterwards, to wit, on the 5th day of January, A. D. 1885, there was issued out of the clerk's office of said court our certain subpœna directed to the marshal of said district and against the said defendant- herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, *Southern District of Ohio*, } *ss*:

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon D. P. Hyatt, W. H. Harper, W. C. Herron, and Lewis Seasongood, impleaded with others, citizen- of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against *him* by Josiah W. Preston *et al.*, citizens of and resident in the State of Illinois.

Hereof you are not to fail, under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of January, A. D. 1885, and in [SEAL.] the 109 year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk*.

28 *Memorandum.*

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of February, 1885; otherwise the said bill may be taken *pro confesso*.

B. R. COWEN, *Clerk*.

(Endorsed thereon:) W. C. Elstner acknowledges himself security for *for* all costs for which the plaintiff may be liable in this case.

29 And afterwards, to wit, on the 5th day of January, A. D. 1885, there was issued out of the clerk's office of said court our certain subpœna directed to the marshal of said district and against the said defendant herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Cincinnati, Columbus and Hocking Valley R'y Co., a corporation existing under the laws of the State of Ohio, impleaded with others, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against *him* by Josiah W. Preston *et al.*, citizens of and resident in the State of Illinois.

Hereof you are not to fail, under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of January, A. D. 1885, and in the 109 year of the Independence of the United States of America.

Attest: [SEAL.] B. R. COWEN, *Clerk.*

30 MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of February, 1885; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

(Endorsed thereon:) W. C. Elstner acknowledges himself security for *for* all costs for which the plaintiff may be liable in this case.

31 And afterwards, to wit, on the 5th day of January, A. D. 1885, there was issued out of the clerk's office of said court our certain subpœna directed to the marshal of said district and against the said defendant- herein; said subpœna is clothed in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon E. L. Harper, Jno. L. Pfau, E. Snowden, and J. W. Matthews, impleaded with the Cincinnati, Col. & Hocking Valley R'y Co., a corporation, *et als.*, citizen- of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for

the southern district of Ohio aforesaid, at Cincinnati, on the first Monday in March next, to answer a certain bill in chancery filed and exhibited in said court against *him* by Josiah W. Preston *et al.*, citizens of and resident in the State of Illinois.

Hereof you are not to fail, under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of January, A. D. 1885, and in the 109 year of the Independence of the United States of America.

[SEAL.]

Attest: B. R. COWEN, *Clerk.*

32 MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of February, 1885; otherwise the said bill may be taken *pro confesso.*

B. R. COWEN, *Clerk.*

(Endorsed thereon:) W. C. Elstner acknowledges himself security for *for* all costs for which the plaintiff may be liable in this case.

33 And afterwards, to wit, on the 10th day of January, A. D. 1885, came the marshal to whom the above was in form directed and returned the same into the clerk's office of said court, with his proceedings thereon endorsed, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, O., Jan. 5th, 1885, and served the same in Hamilton county, O., as follows: On the within-named D. P. Hyatt, W. H. Harper, W. C. Herron Jan'y 7, 1885, and Lewis Seasongood Jan. 8, 1885, by delivering a true copy hereof to each of them personally.

4 services	$8 00
4 copies	2 00
4 miles	24
Total	$10 24

LOT WRIGHT, *U. S. M.*,
By C. E. TWIFORD, *Deputy.*

34 And afterwards, to wit, on the 10th day of January, A. D. 1885, came the marshal to whom the above was in form directed and returned the same into the clerk's office of said court, with his proceedings thereon endorsed, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, O., Jan. 5th, 1885, and served the same in Hamilton county, O., as follows: On thw within-named E. L. Harper, John L. Pfau, and E. Snowden by delivering a true copy hereof to each of them personally Jan. 7, 1885; also a copy to J. H. Matthews personally Jan'y 7, 1885.

4 services	$8 00
4 copies	2 00
4 miles	24
Total	$10 24

LOT WRIGHT, *U. S. M.*,
By C. E. TWIFORD, *Deputy.*

35 And afterwards, to wit, on the 10th day of January, A. D. 1885, came the marshal to whom the above was in form directed and returned the same into the clerk's office of said court, with his proceedings thereon endorsed, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, O., Jan. 5th, 1885, and served the same in Hamilton county, O., as follows: On the within-named The Cincinnati, Columbus and Hocking Valley R'y Co. by delivering a true copy hereof to D. P. Hyatt, pres't of said Co. and J. H. Matthews, sec't'y of said Co., each of them personally Jan. 7, 1885.

2 services	$4 00
2 copies	1 00
2 miles	12
	$5 12

LOT WRIGHT, *U. S. M.*,
By C. E. TWIFORD, *Deputy.*

36 And afterwards, to wit, on the 16th day of January, A. D. 1885, came the marshal to whom the above was in form directed and returned the same into the clerk's office of said court, with his proceedings thereon endorsed, clothed in the words and figures following, to wit:

Marshal's Return.

Received this writ at Cincinnati, O., Jan. 5th, 1885, and served the same in Dayton, Montgomery Co., O., as follows: On the within-named John E. Gimperling by delivering a true copy hereof to him personally Jan. 12, 1885; also on W. D. Lee by leaving a true copy hereof at his usual place of residence with his wife, Mrs. Lee, Jan. 13, 1885.

2 services	$4 00
2 copies	1 00
215 miles	12 90
	$17 90

LOT WRIGHT, *U. S. M.*,
By C. E. TWIFORD, *Deputy.*

37 & 38 And afterwards, to wit, on the 20 day of January, A. D. 1885, came the marshal to whom the above was in form directed and returned the same into the clerk's office of said court, with his proceedings thereon endorsed, clothed in the words and figures following, to wit:

Marshal's Return.

Within-named George E. Clymer not found in this district.
LOT WRIGHT,
U. S. M., S. D. O.,
By T. M. TURNER, *Deputy.*

Cincinnati, O., Jan'y 20, 1885.

39 And afterwards, to wit, on the 27th day of January, A. D. 1885, the following appearance was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appearance.

In the U. S. Circuit Court for the S. D. of Ohio, Western Division.

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY R'Y CO. *et al.* } In Chancery.

I hereby enter my appearance as solicitor for John E. Gimperling, one of the respondents.

C. W. FAIRBANKS.

And afterwards, to wit, on the 2nd day of March, A. D. 1885, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, p. 59.

Upon application to the court by counsel for the defendants the defendants are allowed 30 days from this date within which to answer.

40 And afterwards, to wit, on the 25th day of March, A. D. 1885, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

Circuit Court of the United States for the Southern District of Ohio and Western Division. In Chancery.

The defendants, in answer to the bill of complaint of Josiah W. Preston and others, # 3718 of this court, say that on October 12, 1881, said Edward L. Harper was the owner of a narrow-gauge railroad, known as the Col., Washington & Cin'ti railroad, operated under a charter under the laws of Ohio; that said J. W. Preston & Co., W. E. McHenry, Preston and McHenry, and H. Eckert & Co., agents for W. E. McHenry and Preston and McHenry, made some claim against said Edward L. Harper which he disputed. A settlement and compromise was had between said claimants and said Harper by which they agreed, in writing, October 12, 1881, and of that date, that said Harper, within four months from that date, should cause the gauge of said railroad to be changed to a standard gauge, and that it should be extended certain distances at each end; that he would cause a new corporation to be organized under the laws of Ohio, to be named and known as the Cincinnati, Columbus and Hocking Valley Railway Co., and to convey and transfer to said reorganized corporation said railroad and extensions and all the privileges, appurtenances, and plant thereunto belonging unincumbered, and to cause said new company to issue its coupons
41 bonds of denominations of $100, $500, and $1,000 each, payable in 40 years, with 6 % interest per annum, secured by a first mortgage on said road and its extensions, franchises, &c., not to exceed $20,000 a mile of the length of said road and extensions, and also income bonds of like denominations, and to deliver to the following persons certain of said bonds: J. W. Preston & Co., W. E. McHenry, Preston and McHenry, and H. Eckert & Co., agents.

And he agreed also to deliver to them one-half the same amount of said income bonds, which bonds they agreed to accept in full settlement and compromise of said asserted claims against said Harper. Said Harper fully performed his said agreement, and within four months from the date thereof, about ——, 1881, said Harper commenced taking steps toward the reorganization of said corporation pursuant to said agreement by counsel. A certificate of incorporation — to be issued by the secretary of state of Ohio, and accordingly a certificate was issued by the secretary of state — 1881 incorporating the Cincinnati, Columbus and Hocking Valley Railway Co., and thereupon said Harper agreed with the incorporators of said corporation that said corporation should issue to him 1st-mortgage bonds and income bonds as above described, and also certificates of stock of said corporation to the amount of $20,000 each a mile for the length of said road so extended, for and in consideration of which said Harper agreed to transfer and convey to said corporation said railroad so extended and widened as provided for by said contract with said J. W. Preston and Co.

and others; and in further promotion of said object
42 said Harper subscribed to the capital stock of said company the amount stated in said petition, and had said John L. Pfau, E. Snowden, J. H. Matthews, W. H. Harper, D. P. Hyatt, Wm. C. Herron, J. F. Gimperling, and George E. Clymer each to subscribe a share to enable them to become directors, and their said respective shares of stock were paid for; also by said transfer by said Harper to said corporation of said road; and thereupon all said stockholders met and chose a board of directors on ——, 1881, who forthwith organized and were duly qualified as such, and on December 13, 1881, said Harper made a formal proposition to said company to convey to it said road on the terms above specified, which was forthwith accepted; and thereupon, in full payment for all said stock of $20,000.00 a mile for the length of said road, which proved to be 28 miles, $560,000, and in full payment for said 1st-mortgage bonds and income bonds, to the amount each of $20,000 per mile, said Harper, who still owned said road, conveyed the same, with all its appurtenances as aforesaid, to said newly organized company unincumbered, as required by said contract.

At the time said Harper agreed to convey and did convey said road, &c., to said company, and it agreed to issue to him said bonds and stock in full satisfaction therefor, said company had not incurred any debt or obligation whatever, nor was the obligation to issue said bonds incurred until said agreement was made by which said Harper subscribed and paid for said stock as above stated and
as part of the same transaction, and said company did not
43 issue nor become liable on said bonds on which said judgments were taken until January 2, 1882.

Pursuant to said agreement with said J. W. Preston & Co. and others said Harper did cause said reorganized corporation to execute and issue said bonds and mortgage to the Union Trust Co. of New York, and made said bonds payable to bearer, and thereupon caused to be delivered to said J. W. Preston & Co. and others said bonds called for by said contract with them, who, with full knowledge of the manner in which said Harper had fulfilled his said contract and of the history of said transaction as above stated, accepted said bonds and received the same in full satisfaction of said agreement. Said judgments set out in said bill were rendered on said identical bonds issued to said J. W. Preston & Co. and others pursuant to said agreement. There is no other stock owned or held by any person, nor has there any ever been subscribed, held, or owned by any person or persons except said stock paid for by said Harper by the transfer of said road, &c., to said company.

Wherefore said defendants ask to be dismissed with their costs.

JORDAN, JORDAN & WILLIAMS,
Attorneys for Defendants.

44 And afterwards, to wit, on the 25th day of May, A. D. 1885, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal W, p. 125.

Upon ap-lication of counsel it is ordered that the default herein be, and the same is hereby, set aside and leave granted complainants to file their replication herein forthwith, and the same is filed.

And afterwards, to wit, on the 25th day of May, A. D. 1885, the following replication was filed in the office of the clerk of said court. Said replication is in the words and figures following, to wit:

Replication.

United States Circuit Court for the Southern District of Ohio, Western Division.

JOSIAH W. PRESTON, EUGENE H. LAHEE, WM. E. MCHENRY, Charles J. Gilbert, Wm. T. Baker, Murry Nelson, Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, Complainants,

vs.

THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY CO., Edward L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, Lewis Seasongood, W. D. Lee, & John E. Gimperling, Defendants.

45 The replication of Josiah W. Preston, Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, William T. Baker, Murry Nelson, Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, complainants, both to the original answer of the Cincinnati, Columbus and Hocking Valley Railway Co., Edward L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, Lewis Seasongood, W. D. Lee, and John F. Gimperling, the defendants.

These repliants, saving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill and their amendment thereto to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answers contained material or effectual in the law to be replied unto, confessed and avoid-, traversed or denied, is true; all which matters or things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill and amendment thereto they have already prayed.

FRANCIS A. RIDDLE,
PAXTON & WARRINGTON, AND
BOYCE & BOYD,
Solicitors for Complainants.

46 And afterwards, to wit, on the 13th day of June, A. D. 1885, and entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, p. 132.

Upon motion of complainants it is ordered that Albert S. Longley, of Cincinnati, in said district, be, and he hereby is, appointed special examiner to take evidence in the above case, under and in accordance with the 67th rule in equity, and to report the same to the court.

47 And afterwards, to wit, on the 6th day of October, A. D. 1885, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, p. 192.

Upon application to the court and by consent of all parties hereto the respondents are allowed 20 days from this date within which to complete taking testimony, and the complainants are allowed 5 days thereafter within which to take and file rebutting testimony herein.

And afterwards, to wit, on the 27th day of October, A. D. 1885, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, p. 214.

Upon application of the respondents they are allowed until January 1, 1886, within which to complete taking testimony herein.

And afterwards, to wit, on the 9th day of January, A. D. 1886, the following depositions were filed in the clerk's office of said court clothed in the words and figures following, to wit:

Depositions.

48 And afterwards, to wit, on the 9th day of January, A. D. 1886, the following deposition of Charles E. Henderson, a witness, was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Deposition of Charles E. Henderson.

The deposition of CHARLES E. HENDERSON, a witness residing in the city of Indianapolis, in the State of Indiana, taken under the stipulations hereto annexed, produced, cautioned, and duly sworn to speak the truth, the whole truth, and nothing but the truth in a certain cause now pending in the United States circuit court for the southern district of Ohio, western division, wherein Josiah W. Preston and others are complainants and the Cincinnati, Columbus &

Hocking Valley Railway Company and others are defendants, deposes and says as follows:

To interrogatory No. 1 witness answers: Charles E. Henderson; age, 41 years; residence, Indianapolis, in the State of Indiana, and occupation, railroad dusiness.

To interrogatory No. 2 witness answers: I do. I operated the road as general manager for several months. About 2 years ago I operated the road for a period of four (4) or five (5) or (6) six months, and during the time I operated it I was general manager of the Ohio Southern, under agreement with the manager of
49 the road, and afterwards in each operation. The physical condition of the road is very inferior, being originally a narrow-gauge road, with short ties and light rails; the rails were spread, not to the standard gauge, without the necessary long ties put under them, and they were too light for the use to which they were put, namely, the operation of a standard-gauge road. The length of the road, I believe, is about 28 miles, and the amount of business done over it was very small. It is fair to say, however, that during the time I operated it it was just after a failure of the crops; consequently the business was much less than it usually would be or than it now is.

To interrogatory No. 3 witness answers: I have occupied nearly every position on a railroad. I have been station agent and general passenger agent and freight agent, auditor, assistant general manager, and general manager and receiver of various railroads, the Indiana, Bloomington and Western being the principal one. I have been engaged in the railroad business since 1869.

To interrogatory No. 4 witness answers: I can only give my opinion of the value of the road, which is it is worth very little more than the material which could be taken from the road and
50 sold. If the rails were sold they would yield, I suppose, about two thousand or twenty-five hundred dollars a mile, and that is about all that I would be willing to give for the road, and I would not be willing to give that unless some arrangement could be made by which I could take the rails and dispose of them, although some parties might consider it more valuable than that.

To interrogatory No. 5 the witness answers: The road, operated as a road, taken by itself and without any relation to or being made a part of any through line, is of very little value, in my opinion, beyond the value of the material, and I do not know of any other use for which the property could be used. If it could be in any way connected and made a through line, it might then be more valuable to a person who could use it in that way.

To cross-interrogatory No. 1 witness answers: I do not remember Mr. McHenry at all. The only man that I had talk with was Mr. Hyatt. I do not recollect ever seeing W. E. McHenry. I have no recollection of seeing Mr. Preston. I do not know Mr. McHenry and to my knowledge I never saw him in my life, and never saw any other of the plaintiffs along the line of the road.

CHARLES E. HENDERSON.

51 Subscribed and sworn to before me by the said Charles E. Henderson the 7th day of January, A. D. 1886.

[SEAL.] LIZZIE ABBOTT,
Notary Public.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Lizzie Abbott, a notary public in and for the county of Cook, in said State, do hereby certify that the above and foregoing deposition of Charles E. Henderson was taken before me, in pursuance of the annexed stipulation, on the 7th day of January, A. D. 1886, at my office, room 206, Home Insurance building, 205 La Salle street, in the city of Chicago, in the State of Illinois; that before the commencement of his examination said witness was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in a certain cause now pending and undetermined in the U. S. circuit court for the southern district of Ohio, western division, wherein Josiah W. Preston *et al.* are complainants and the Cincinnati, Columbus and Hocking Valley Railway Co. *et al.* are defendants; that said deposition was reduced to writing by me and at the conclusion of the same was read over by said witness, who thereupon signed and swore to the same before me.

I further certify that I am not related to any of the parties interested in said suit, nor am I interested therein as counsel or otherwise.

Witness my hand and notarial seal this 7th day of January, A. D. 1886.

LIZZIE ABBOTT, [SEAL.]
Notary Public.

52 United States Circuit Court, Southern District of Ohio, Western Division.

JOSIAH W. PRESTON *et al.*, Plaintiffs,
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY R'Y CO., E. L. HARPER, *et al.*, Defendants.

It is hereby stipulated that the following interrogatories and cross-interrogatories may be answered by C. E. Henderson, of Indianapolis, Ind., and shall be read and used in evidence with the same force and effect as if duly taken before the examiner in this case heretofore appointed:

1st interrogatory. State your name, age, residence, and occupation.

2nd Int. State if you know the Cincinnati, Columbus and Hocking Valley Railway Company, and what, if any, relations you have borne to the company, and what, if any, experience in the operation of the road you have had, giving dates of commencement and termination and details of your knowledge and experience concerning

the physical condition and length of the road and generally the amount of business that was done over it.

3rd Int. What, if any, experience—and in what capacity—
53 have you had in other railroads than the one before mentioned? State somewhat in detail.

4th Int. Do you or not know the value of the Cincinnati, Columbus and Hocking Valley Railway Co. in and during the year 1881 and since then?

5th Int. If the answer to your last preceding interrogatory be yea, what, in your judgment, was the fair cash market value of that railroad in the autumn of 1881 and at any time since then? In what connection, state, if you know, what its value was as a railroad or for any other purpose to which the property could be appropriated or for which it could be used.

In witness whereof we hereto attach our signatures.

FRANCIS A. RIDDLE,
BOYCE & BOYD,
PAXTON & WARRINGTON,
Att'ys for Complainants.

Cross-Interrogatories.

State whether you saw Preston, McHenry, or any other of the plaintiffs or their agents at or along the line of said railroad at any time; and, if so, when, where, and what occurred.

JORDAN AND JORDANS,
Att'ys for Defendants.

54 And afterwards, to wit, on the 10th day of February, A. D. 1886, the following testimony was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Testimony.

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C, copy of minutes of railway Co. organiz. 354
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A 1, Harper, stub check book 373
A 2, C, D, E, F, G, H, I, J, K, L, M, and N (Harper), checks, drafts paid by Harper on account of construction 374
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56 THE UNITED STATES OF AMERICA, *Southern District of Ohio*, } ss:

The President of the United States of America to Albert S. Longley, Esq., Cincinnati, O., Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you special examiner, and by these presents to give you full power and authority diligently to examine — upon his or their respective corporal oaths or affirmations before you to be taken as witness or witnesses on the part of the complainants in a certain cause now pending — undetermined in the circuit court of the United States of America for the southern district of Ohio, in the sixth circuit, wherein Josiah W. Preston and others are complainants and The Cincinnati, Columbus and Hocking Valley Railway Company and others are respondents, touching the premises.

And we do hereby require you to reduce the same to writing and to close it up under your hand and seal, directed to B. R. Cowen, clerk of the circuit court of the United States for the southern district of Ohio, at Cincinnati, Ohio, and that you return the same, when executed as above directed, annexed to this writ, with the title of the cause indorsed on the envelope of the commission, into
57 said circuit court, before the judges thereof, with all convenient speed.

Witness the Hon. Morrison R. Waite, Chef Justice of the
[SEAL.] United States, this 13th day of June, A. D. 1885, and in the 109th year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

58 United States Circuit Court, Southern District of Ohio, W. D.

JOSIAH W. PRESTON *et al.*, Complainants,
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY COMPANY *et al.*, Respondents. } #3718.

Report of Special Examiner.

Depositions of sundry witnesses taken before me, Albert S. Longley, a special examiner appointed by the above-entitled court diligently to examine — upon their respective corporal oaths or affirmations before me, to be taken as witness or witnesses on the part of the complainants in a certain cause now pending — undetermined in the said circuit court, and by agreement of counsel on the part of the respondents also, wherein Josiah W. Preston and others are complainants and The Cincinnati, Columbus and Hocking Valley Railway Co. and others are respondents, touching the premises; to reduce the same to writing and to close it up under his hands and seal, directed to B. R. Cowen, clerk of the said circuit court at Cincinnati, Ohio, and to return the same when executed as above directed, annexed to said writ, with title properly endorsed.

59 Testimony of sundry witnesses taken before me, the undersigned, at my office, No. 17½ West Third street, Cincinnati, Ohio, under a commission as special examiner issued by the United States circuit court for the southern district of Ohio, western division, to be used on behalf of the complainants in a cause now pending and undetermined in said court, wherein Josiah W. Preston and others are complainants and The Cincinnati, Columbus and Hocking Valley Railway Co. and others are respondents.

JUNE 22, 1885.

Present: Messrs. Riddle, Paxton and Boyd, for complainants, and Judge Jordan, for the respondents.

J. H. KIRK, of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. BOYD:

Q. 1. State your name, age, residence, and occupation.
A. My name is J. H. Kirk; I am 49 years of age; my residence

is Clinton county, Ohio, near Wilmington; I am a farmer, but have been railroading for some years past. I have been connected with this road for seven or eight years past—ever since it has been built.

60 The further taking of this evidence was adjourned over until Wednesday, July 23, 1885, at 10 o'clock a. m.

WEDNESDAY, *July* 23, 1885.

Met pursuant to adjournment.

Counsel all present and the witness on the stand for further direct examination.

Examination by Mr. BOYD:

Q. 2. Please state what connection you have had with the Cincinnati, Columbus and Hocking Valley Railway Co.

A. When it was first organized—I think it was in the year 1877—I took about $700 of stock in the concern; delivered lumber for the tressels that year and got very much interested in the enterprise, and they elected me as a director for the following winter, I think it was. I may be mistaken; I have not thought of it for many a day before. I may be mistaken in the dates. It was in 1878, I think, that I served in that capacity, until it went into the hands of the receiver, John E. Gimperling.

Q. 3. Prior to that time it was under another man, however, was it not?

A. Yes, sir. The name of the road was the Cincinnati, Washington and Columbus railroad—no; the Columbus, Washington and Cincinnati.

Q. 4. Go on and state what your connection with the enterprise was beyond that.

A. We ran the road that summer—kept it in operation. We
61 found that it was running behind and that we would best throw it into the hands of a receiver; so we went before the court and got John E. Gimperling to take charge of it.

Q. 5. As receiver?

A. Yes, sir. After he took charge of the road then I didn't have any connection with it. I turned the whole business over to him. He ran the road.

Q. 6. What connection have you since had with the road?

A. It stayed in the hands of the receiver, I reckon, about a year. Then he put the road up for sale at the door of the court-house in Xenia. I think it was in the year 1879. I was one of the purchasers of the road on that day. Five of us bought the road in. I was one of the owners of the road then, and we let it stay in the hands of Gimperling—let him run the road for all there was in it in connection with the Dayton and Southeastern, so that he didn't let it run behind until we could dispose of the property. We let it run that way probably six months. We met one evening. I think I made the motion authorizing two of the purchasers to come down here and see E. L. Harper in regard to a sale of this property. I had had some acquaintance with Mr. Harper; had frequently met

him and talked to him about this road; so I made a motion that Mr. Merchant and Dr. Hussey come down and see him. John Merchant was president of the road and Dr. Hussey one of the directors.

62 Q. 7. What then did you with the road next?

A. We proceeded to sell it as quick as we could; we found that it was not paying us. We wanted to sell to some railroad man who would make it pay.

Q. 8. To whom did you sell it and when?

A. To E. L. Harper. I reckon it must have been the winter of 1879—the summer that Harper was up at Chicago. I forget the date now. They came down here in the March of that year and went back and reported progress; said that E. L. Harper would take the road. We eventually made a sale of the road to Mr. E. L. Harper.

Q. 9. What connection, if any, did you have after that with the road—after the sale of the road?

A. Not any then. That severed my connection with the institution, but I was in business along the road.

Q. 10. Did you ever have anything to do with the road after Harper sold it?

A. No, I was not connected with the running of it, but only as a shipper of stock and grain over the road after that.

Q. 11. Have you any connection with the road now?

A. Yes, sir; I have been running the road—started in to run it the first day of June one year ago. I ran the road up until the 25th day of January. Then I started in to run it about the first of this last June and am running the road now and have charge of it.

63 Q. 12. From whom?

A. For the receiver, Thomas Hanna, of Cincinnati.

Q. 13. State whether or not you have run the run since Mr. Hanna was appointed receiver for him or under him.

A. Yes, sir; I have had charge of the road ever since, but we have not had trains on it all the time. Feb., March, April, and May was a vacation. The I., B. & W. ran it for awhile there and then quit. Since the I., B. & W. quit I have had charge of it. I wish to make that correction. I did not think of the I., B. & W. having had charge of it.

Q. 14. Do you know what was the value of the road in the latter part of 1881 or the early part of 1882?

Counsel for the respondent- object to the question as incompetent and irrelevant, and further now make objections to all the proceeding examination as irrelevant.

A. In the markets of the world?

Q. 15. No. As a railroad, did you know its value?

A. Yes, sir.

Q. 16. What was its value?

Counsel for the respondents object for the same reason.

Question continued. After Mr. Harper had widened the gauge

and extended it to Jeffersonville on the one end and to Claysville at the other, its value as a railroad property?

64 Same objection.

A. $25,000.

Q. 17. Was its value prior to that time, say in the latter part of 1881, greater or less?

Counsel for the respondent- makes the same objections.

A. That was before Mr. Harper made any improvements on it?

Q. —. Yes, sir.

A. It was of less value at that time.

Q. 19. What was the earning capacity of the road at the time of which you speak, say in 1881–'2?

Counsel for the respondents makes the same objection.

A. It was a hard matter to make it pay expenses at any time, I know, but I was not acquainted with the earnings at that time. I knew those men that run it.

Q. 20. Did it at any time earn money for its owners?

Counsel for the respondents makes the same objection.

A. I have never known it to. It ran behind while we were running it, before we sold it. I recollect that we held a meeting and the institution was seven hundred dollars short after we had run it for several months.

Q. 21. What do you mean by its running behind?

A. It didn't pay expenses—section men and trainmen—but we advanced the $700 all the same, rather than stop the trains.

65 Judge JORDAN: The respondents now come and enter their objection to the taking of this testimony and proceed to—

Cross-examination by Judge JORDAN:

X Q. 22. State whether or not you had the means of knowing the cost of the construction of this road originally.

A. I was not connected with the board of directors the first year, and never paid much attention to it. It probably cost $100,000 or $150,000, or somewhere along there—from $100,000 to $150,000.

X Q. —. Do you not know that the construction of the road—the roadway—the getting it ready for the rolling stock—originally cost over two hundred thousand dollars?

A. I said I never paid much attention to that. I was not in there until the 2nd year, and I could not say definitely.

X Q. 24. Do you not know that it was considered and understood in the board of directors that the cost of the road-bed, the grading, bridges, ties, iron, and everything essential to get it in readiness for the rolling stock, cost the company over two hundred thousand dollars; that it was so talked of, considered, and understood by the board of directors?

Counsel for the complainants object to the question as incompetent and irrelevant.

66 A. I will say no; that I didn't know it; I was not in that 1st board of directors; I went in the 2nd year.

X Q. 25. State what was the highest sum that you understood at that time the cost was; state what that sum is.

Counsel for the complainants object to the question for the same reason.

A. From one hundred to one hundred and twenty-five thousand dollars, the original cost of the concern.

X Q. 26. When you speak of the original cost, what do you mean?

A. The right of way, the ties, the iron, the tressels, &c.

X Q. 26½. Ready for the rolling stock, do you mean?

A. The iron and right of way. It was very inferior timber put in the bridges; that was not very valuable. It was beech timber, nearly all of it; over half of it, anyway.

X Q. 27. It was then constructed as a narrow gauge?

A. Yes, sir.

X Q. 28. How much shorter was it then than now?

A. 4½ miles shorter.

X Q. 29. When was it sold to Mr. Harper; was it sold as a narrow gauge or broad gauge?

A. Narrow gauge.

X Q. 30. What was the price at which it was sold to Mr. Harper?

67 Counsel for the complainants objects to the question as irrelevant and incompetent.

A. Several thousand dollars, I think.

X Q. 31. Did you ever see Mr. Preston up at the road?

A. No, sir.

— Q. 32. Did you ever see any of these complainants up there?

A. What are the names of the complainants?

X Q. 33. Preston, McHenry, Baker, Nelson, Gilbert, Gould, Kent, Sherman, Lehee, and Selah Young, Jr. Did you ever see any of these present?

A. I saw Mr. McHenry once.

— Q. —. When did you see Mr. McHenry once?

A. I could not tell what year it was *not*.

X Q. 35. What was his business there?

A. I don't know.

X Q. —. Was that before or after it was made a broad gauge?

A. I reckon that it was on a narrow-gauge train that I must have seen him.

(Signature of witness waived.)

68 JAMES F. ELY, of lawful age, being first duly sworn, deposes and says as follows:

Examination of Mr. PAXTON:

Q. 1. State where you resided in 1880, '81, '82, and in what business you were engaged at that time, and what, if any, knowledge

you have of the construction of the road now known as the Cincinnati, Columbus and Hocking Valley railroad.

A. In 1880–'81 I lived in Washington Court-House. I lived there from 1854 to 1881; from 1881 to the *to the* present time I have lived in Hamilton county At the time I lived in Washington Court-House, from the time I went there, in 1852–'53, to 1881 I was in the mercantile business and engaged occasionally in outside matters. Among them was that of president of the road that was then termed the C., W. & C.—Cincinnati, Columbus and Hocking Valley Railway Co.

Q. 2. In what way were you connected with that road and in the construction of the railway?

A. I was president of the corporation and directed the construction of it—me and the directors. The construction was under my supervision.

Q. 3. You may state, if you know, then, the general character of the railway and the character of the construction and material that entered into it.

69 Counsel for the respontents object to the question as incompetent.

A. Do you speak of its general character?

Q. 4. No; of its material character.

A. I am going to say morally it is a good road.

Q. 5. Its physical character.

A. It never had very much character for good so far as value was concerned—very poor—and the construction of the road was equally as poor; consequently it was really deserving of a very bad name so far as character for worth was concerned.

Q. 6. Now, what was the character of the grading, curbs, cuts, fills, and the culverts upon the line of the railway and the bridges at the time of its completion?

Counsel for the respondents object to the question as incompetent.

A. The grading, so far as the maximum grade was concerned—I think it was about 36 or 38 feet to the mile going west and about 60 going east. The cuts and fills were intended to be made as all railroad fills are. I would have to go to the books to examine what that is, and the construction company was not very stiff, so far as financial ability was concerned, and the C., W. & C. had still less stamina. Therefore we could not be very exacting with
70 them and we looked over a great many defects that ought not to have been overlooked—would not have been overlooked had we been able to pay them for the work according to the contract.

Q. 7. Now, what was the construction of the culverts?

Counsel for the respondents objects to the question for the same reason.

A. The culverts were built of wood of the very cheapest kind. We could get wood given to us if we would take it—beach, hickory,

or rough timber. Anything given to us we always took. If it was worth anything, we took it; if not, we didn't take it. The trestle-work and culverts were constructed of that material principally. We had one expensive one to make, which was very high, on which, of *of* course, we would not trust ourselves and the engines. That we made of oak. The balance, so far as my judgment leads me—it has been a good while ago and I may have forgotten—the balance was all of beach and sugar tree, which ought not to have been put into any railroad, and, if the commissioner of railroads had gone over the road, it would not have been allowed to be put in. We were lucky enough to keep the commissioner away and our road was permitted to run.

Q. 8. I will ask you if you, from the information of which you are possessed and the knowledge you have of the character
71 of the construction of this *of this* road, you are able to state its value about the latter part of 1881 or the early part of 1882.

Counsel for respondents objects to the question as incompetent and irrelevant.

A. Of course I could give an opinion, but whether it would be worth anything is a matter for the court and jury to decide.

Q. 9. You can give the opinion.

A. I will give you my opinion.

Q. 10. State now what the value of said road was at the time referred to.

Counsel for the respondents objects to the question for the same reason.

A. According to my views in regard to the value of property, real estate or anything, is what it will bring under the hammer, and I will state what that road would *would* bring under the hammer if any party should go along the line of the road and investigate the condition of the road and the status of the feeling of the people along the line of the road as to what should be done with it. That is why I shall base my value on it. So far as the road was concerned, as a railroad running, it had no worth. You know before I quit the road, before I resigned, all the connections were cut off from it at both ends; at that time it was the Miami Valley, and that Gatch's road cut us off from Columbus. I look upon it as valueless, so far
72 as a railroad was concerned; that whoever should run the road would run it at a loss. Now, looking at it as worthless as a railroad—the concern or corporation to be sold—you know it would be worth nothing, only what the iron would bring. Then, to buy that road, if I were to purchase it knowing the feeling along the road then—because I came very near being mobbed myself because I could not pay the debts against the road—knowing the feeling for them, to undertake to take up the rails, I or anybody else, it would not have been worth anything because of the danger of the thing; consequently I think one hundred dollars per mile, taking all the chances into consideration, would be all that that road was worth to

anybody at that time. Before it was changed into a standard-gauge road I would not count it worth anything.

Q. 11. What value had this road as a railroad after it was changed into a broad-gauge, standard gauge, and completed to Jeffersonville at the upper end and Claysville at the lower end at the time I have stated?

A. It was completed to Claysville before I left the road. The connection was there at that time, but there was some land bought for depot purposes at the lower end after it went into this other corporation. I don't know what it cost. But the road was completed to Claysville—about a mile below Claysville—calles the Claysville Junction, and about 4 miles on the east end of the road. I have never seen except as I have seen it looking out of the car window. So far as that is concerned I could not put any definite value upon
73 that, but, so far as the 23 miles are concerned, I think, through this distance from Allentown to the Claysville Junction—so far as that is concerned, all the extra value would be just what it cost to spread it out and ties put in every 17 feet, and ties were worth forty cents—a good tie—and I could not tell you the value of spreading it out, and the betterment of the bridges.

That is all the value to be placed on it as a railroad. I would not consider it, as far as the value of the property is increased, worth a dollar more after made to the standard gauge; in fact, not so much, because it was intended to connect with the Northern road at this end, and the Northern road has never been any other gauge, and the Dayton and Southeastern is still, and it was for the purpose of running coal from the coal mines to Cincinnati that I was induced to take hold of the railroad to build it.

Q. 12. Did it connect with the Dayton and Southeastern at any point on the line?

A. Yes, sir.

Q. 13. And what was the gauge of that road?

A. The same gauge—three feet.

Q. 14. It is your opinion, then, that the widening of the gauge and the extending of the road to Jeffersonville did not increase its value as a railroad property for the reason that the proposed connection- were both narrow-gauge roads?

74 Counsel for the respondents objects to the question.

A. The connections at both ends were narrow-gauge roads, and the widening of the track increased the expense of keeping up the road-bed, and the running of said road necessarily reduced the value of the road unless they had connections with a standard-gauge road.

It was here agreed by counsel that either party might have the privilege of making objections at the end of the testimony to any question asked by the other.

Q. 15. What knowledge have you, if any, of the character of the work done in the widening of the road—in the widening of the gauge?

A. None personally.

Q. 16. What was the earning capacity of the road at the time referred to, the latter part of 1881 and the early part of 1882?

A. I have no definite knowledge of the earnings of it after I surrender- my management.

Q. 17. What was the date of the surrender of your management of it?

A. About 1880.

Q. 18. What, if anything, do you know as to how the earnings of the road have compared with the expense of operating it?

A. It was a loss under my administration from the very
75 first train I ran on it until the last dau I ran it.

Q. 18½. What do you know about it since then?

A. I have consulted with Mr. Gimperling.

Q. 19. From your own knowledge, I mean.

A. Nothing whatever.

Q. 20. Who was Mr. Gimperling?

A. He was the receiver.

Q. 21. Have you ever been over the road since it has been widened?

A. No, sir; I have not been over the road since I was president, a short time before it was widened.

Q. 22. Has its character improved since the time you left the road?

A. No, sir; I was only too glad to get away from it.

A. What is the value of the road now?

A. As I stated before, it would be pretty hard to give a value of it, but I don't consider that anybody that has any money to invest would buy it at all as a railroad property.

Q. 24. I will ask you if it has any value over and above what might be realized from the material if it could be removed.

A. That is the only value that I look upon in the road, whatever might be realized from the material with which it is constructed.

Q. 25. Had it any other value than that in the latter part of 1881 and early part of 1882?

76 Ans. It had its franchises and rights of way, which we had a clear title for, but whether or not the right of way would not revert back to the original land-owners is a question. I presume it would, for it had very little value to anybody except the original owners.

Q. 26. I asked you if it had any greater value than that in the latter part of 1881 and early part of 1882.

A. I think not.

Cross-examination by Judge JORDAN:

X Q. 27. I understand you to say that you have not seen the road since it has been widened to the standard gauge.

A. No, sir.

X Q. 28. And that you were not along the line of the road during the time that they were widening it into a standard gauge?

A. No, sir.

X Q. 29. Pleas- state how you know, then, that there was one tie inserted on every seventeen feet and how it was simply widened by spreading out the rails, and that the only change was made in the bridges and culverts.

A. That is what I learned, you know, from the parties who are interested in the road now and running the road. That is all.

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X Q. 30. That is your only means of knowing, is it?

A. Yes, sir.

X Q. 31. You never learned that from Mr. Harper?

A. No, sir.

X Q. 32. State when you left Washington Court-House to reside in Hamilton county.

A. I left Washington Court-House in the fall of 1881.

X Q. 33. How near to Washington Court-House does that road run?

A. During my administration it run into Washington C. H. I had an arrangement with the Dayton and Southeastern, but after I resigned and the road went into the hands — who bought the road they stopped it at Allentown, nine miles west of Washington C. H.

X Q. 34. Then the eastern terminus is at Allentown, 9 miles from Washington C. H.?

A. It was then.

X Q. 35. But did it connect with any other road into it?

A. It connected with the Dayton and Southeastern and ran into Washington Court-House over its road. It did then, but does not now.

X Q. 36. But while it was a narrow-gauge road it did?

A. Yes, sir.

X Q. 37. The Dayton and Southeastern is still a narrow-gauge road?

A. Yes, sir.

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X Q. 38. What other officers of the road were there besides yourself?

A. There were 5 directors, the president and vice-president being of the directors.

X Q. 39. Where did they reside?

A. The directors and vice-president resided along the line of the road.

X Q. 40. When did you say you left the management of the road?

A. I think it was in 1879 or 1880.

X Q. 41. But you remained there a year or so afterward?

A. Yes, sir; until 1881.

X Q. 42. Did your directors remain and do they still reside there?

A. Yes, sir.

X Q. 43. Did you ever see Mr. Preston, McHenry, or *or* Eckert up there?

A. No, sir.

X Q. 44. Never saw them along the line of the road?

A. No, sir.

X Q. 45. If a person had gone up there along the line of the road along in 1881, say, they could have found the board of directors up there, could they not?

A. I think so.

X Q. 46. They could, by traveling over the road, have seen and found out its condition and character?

A. If the weeds had been cut down along the line they might have seen it; there are some places where the weeds are so high they could not.

79 X Q. 47. Still, if they had seen fit to take a car and travel along the line of the road, they could have seen its condition?

Counsel for the complainants objects to the question.

Question modified:

Was there any obstruction in the line of the road that would have prevented them from traveling over the line of the road and seeing the condition of the road?

A. Not to my knowledge.

X Q. 48. The cars ran upon it, did they not?

A. I think they generally did.

X Q. 49. So that if either of these gentlemen had seen fit to have gone up there they might have learned the situation and character of the road, might they not?

A. I think so.

X Q. 50. You would have cheerfully given them your opinion of it if they had come to see you?

A. Yes; I think so. I would not have charged them for it, but I do not know that I could have advised them to invest very much money in it.

X Q. 51. Have you ever seen either of these gentleman since the widening of the road—Preston, McHenry, or Eckert?

A. No, sir. All I know of McHenry is that he is the gentle-

80 man in Chicago connected with Mr. Preston. I *I* knew the firm as a firm but not personally.

X Q. 52. You were one of the promoters of this railroad, were you not?

A. Yes, sir.

X Q. 53. Who was the contractor and builder?

A. Col. Yomans and the firm of Geo. Potts & Co. They were the construction company.

X Q. —. Had the right of way been secured by the corporation before the construction contract was made?

—. ——.

X Q. 55. The construction contractor had nothing to do in securing the right of way?

A. No, sir.

X Q. 56. What was it you contracted with him to do—with Potts & Co.?

A. We contracted with Potts & Co. to do the grading simply.

X Q. 57. Who furnished the ties?

A. We bought the ties of various parties.

X Q. 58. Who furnished the iron?

A. E. L. Harper; the construction company was to furnish the iron. It was the Swift Iron and Steel Works; not E. L. Harper; but E. L. Harper was their agent. They sold them the iron by my giving my individual indorsements.

X Q. 59. Now, you may state what it cost the corporation to secure the right of way in grading and building the bridges, culverts, laying the ties, and furnishing the iron and all the incidental
81 expenses connected with the contractors and their agents until it reached the point where it was fit for the rolling stock.

Counsel for the complainants object to the question as incompetent and irrelevant.

A. I am not in a position to give that with sufficient correctness to warrant it, but I give you some things in detail that would perhaps do if you were to get other evidence.

X Q. 60. Give it to the best of your recollection.

A. I would want you to have it in detail; I would not want to put it together.

X Q. 61. You can give it in detail.

A. I think the right of way cost us in cash—all we ever paid out for right of way was six or seven hundred dollars, not to exceed six or seven hundred dollars in cash, perhaps, and I was going to say that the right of way was given to us universally along the line of the road, except two or three parties, and I don't think any cash was paid out; we might have given a few parties some stock, and that was valueless.

X Q. 62. Did you ever transfer any bonds in payment of the right of way?

A. No, sir; not a dollar.

X Q. 63. Go on with your detail; come to the grading next.

A. All the money ever paid out for grading to this con-
82 struction company—this construction company took, it is my impression, ten per cent. of their money in stock, twenty-five per cent. in bonds, and the balance in cash.

X Q. 64. What was the amount, all told?

A. My impression now is that the cash we paid this construction company for the construction of this road—of this road-bed—all told, did not exceed seventeen hundred dollars.

X Q. 65. Do you mean the grading?

A. The entire grading, cash, seventeen hundred dollars, exclusive of the bonds and stocks.

X Q. 66. Did that include grubbing?

A. Everything—ditches and everything.

X Q. 67. What was the amount paid them in bonds?

A. I would have to go to the books for that, you know. This thing has all been sprung upon me, and, of course, the books are in the hands of my secretary. I could get them if necessary.

X Q. 68. What is the name of the secretary?

A. Geo. F. Robinson.

X Q. 69. Has he the books showing the costs?

A. He had when I left. Whether he has now or not I don't know; but it would astonish you or anybody or anybody else to see what a small amount was paid out for the construction of the road.

X Q. 70. What was the cost for building bridges and culverts?

A. I don't remember. We did that by days' labor. The contracter who originall*t* took the bridges failed, and then we
83 had to get up a company to build them ourselves. The men along the line of the road would subscribe three, four, eoght, or ten days' labor, and carpenters would subscribe that much labor, and half the men who done the work, poor fellows, never got anything, and at that time I lost so much money I could not pay them, and Mr. Kirk would tell you the same thing. I went over there one Sunday, and I thought I was going to be mobbed. One fellow I had to pay or I would have been. They seemed to think that I had no business to be president of the road without paying.

X Q. 71. What did -he ties cost?

A. About twelve and one-half cents apiece, I think, and there were 1,500 or 1,600 ties to the mile.

X Q. 72. What did the iron cost?

A. I think about $36 per ton.

X Q. 73. Do you know how many tons there were?

A. No, sir.

X Q. 74. Do you know how much there was of it to the mile?

A. No, sir.

X Q. 75. Did you know how much there was to the mile?

A. I did then, but I do not know now.

X Q. 76. Did you purchase any depot grounds?

A. No, sir; our depot grounds were all given to us. The people along the line of the road were very clever, and they gave us anything of that kind.

X Q. 77. Suppose you take into consideration what was
84 given to the company in labor and materials, right of way, and land for water stations, depots, and all other purposes, all the labor and materials and all property given, taken at a fair and reasonable value, added to what it cost in bonds and stock, what was the aggregate?

A. I could not put any value upon it; I don't want to put any value upon it to-day; it would only be an estimate, and I don't want to go upon an estimate.

X Q. 78. Don't you know it was estimated and considered that it would cost you two hundred thousand dollars to prepare it ready for the rolling stock?

A. I don't know any such figures as that. If it had we never would have undertaken the work.

X Q. 79. That is, if you had known that in advance?

A. No, sir; and I will say that it never did cost that.

X Q. 80. Suppose the Cincinnati and Southeastern should become a standard gauge, would not this become a very valuable connection?

Counsel for the complainants object to the question.

A. No, sir; I don't think it would.

X Q. 81. Would it not enhance its value?

Complainants object to the question.

A. No, sir; I think not; not as a railroad.

X Q. 82. As I understand you, one of the reasons why you place so small a value upon the iron on this road is because of the peril
85 of the purchaser in getting the iron from it if the purchaser should attempt to take it away?

A. That is one reason; that is the reason in the first place. In the second place, my understanding is, and was when I left the road, because we never had been able to ballast the road and the road was in bad shape; the iron had become twisted; then, putting heavy carriage upon the narrow gauge, the iron becomes still more twisted, and the only value in it would be to run it over. Consequently you may make it into iron or sell it for what it is worth. That is another reason.

X Q. 83. Do you — what the terms of sale were of the Indiana, Bloomington and Western?

A. Only from hearsay.

(Signature of witness waived by consent.)

86 Counsel for the complainants offer in evidence the contract of October 12, 1881, between E. L. Harper and J. W. Preston *et al.*, together with the receipt attached to it, marked Exhibit A.

Also the red book containing the articles of incorporation of the Cincinnati, Columbus and Hocking Valley Railway Co., marked Exhibit B.

Also the book marked Exhibit C, from page 1 to 13, inclusive, minutes of the Cincinnati, Columbus and Hocking Valley Railway Co.; also from same book the minutes of the special meeting of said company, commencing on page 24 and closing at the bottom of page 25; also the minutes of the special meeting of said company contained in the said book, commencing on page 37, including page 38, excepting that which is marked out in red ink, down to the middle of page 39.

Counsel for the respondents objects to all these records.

It is admitted by counsel that these books are the occicial books of the Cincinnati, Columbus and Hocking Valley Railway Co.

Also Exhibit D, the Lee contract between E. L. Harper and W. D. Lee, dated Dec. 1, 1881, marked Exhibit D.

87 It is agreed by counsel that the proposition of E. L. Harper, on page 10 of the minute book of the Cincinnati, Columbus and Hocking Valley Railway Co., is a true copy of the original proposition, said proposition being part of the original of Exhibit C.

J. W. PRESTON, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. RIDDLE:

Q. Where do you live?
A. In Chicago.
Q. Are you one of the complainants in this suit?
A. I am.
Q. 3. Do you know the defendants; and, if so, how many of them?
A. Who are the defendants?
Q. 4. Do you know E. L. Harper?
A. Yes, sir.
Q. 5. Do you know W. D. Lee?
A. Yes, sir.
Q. 6. Do you know John E. Gimperling?
A. Yes, sir.
Q. 7. Do you know Wm. H. Harper?
A. Yes, sir.
Q. 8. Do you know D. P. Hyatt?
A. I am not personally acquainted with him; I have met him.

88 Q. 9. Do you know any of the other defendants?
A. Not personally; no, sir.
Q. —. State whether you ever made a contract with E. L. Harper.
A. Yes, sir; I was party to a contract made with E. L. Harper in Oct., 1881.
Q. 11. The contract which is marked Exhibit A?
A. Yes, sir.
Q. 12. Did you ever, after the date of that contract, receive any bonds from E. L. Harper; and, if so, what bonds?
A. We did receive bonds from Harper.
Q. 13. We can shorten that. Did you, with the other parties mentioned in the contract, receive the bonds shown by the receipt, which is a part of Exhibit A?
A. Yes, sir.
Q. 14. When did you receive them?
A. In Feb., 1882; about the 11th or 12th.
Q. 16. Where did you receive them?
A. At the office of Howard, Eckert & Co., in Cincinnati.
Q. 16. Who delivered them to you?
A. E. L. Harper.
Q. 17. Did you at that time know anything about the way in which the Cincinnati, Columbus and Hocking Valley Railway Co. had been organized?
A. I never knew anything about its organization.

Q. 18. Had you ever had any talk with any of its officers?
89 A. I had talked with Mr. Harper.
Q. 19. Only?
A. Only. Yes; I had talks with Mr. Gimperling also during this time, between Oct. 12 and February.

Q. 20. Did you learn from any of them anything about the manner in which the organization had been perfected ?

A. No, sir.

Q. 21. Did you know anything about the transactions of the board of directors of that company ?

A. Nothing at all.

Q. 22. Did you know anything about the connection of its stockholders up to that time ?

A. No, sir.

Q. 23. Was there anything ever said to you concerning any of the business transacted at any meeting of the board of directors of that corporation or at any meeting of the stockholders of that corporation by Mr. Harper or anybody else connected with that road ?

A. No, sir.

Q. 24. Did you know anything concerning the manner or means by which the subscribers to the capital stock of that company had paid for the same at the time you received these bonds or claimed to have paid for their stock ?

A. No, sir ; I knew nothing about it.

Q. 25. Did you have any conversation with anybody con-
90 nected with that road as to what was given in payment for the bonds and capital stock of the Cincinnati, Columbus and Hocking Valley Railway Co. ?

A. No, sir.

Q. 26. Did you ever have any conversation with E. L. Harper at any time in regard to releasing him from his liability as a subscriber to the capital stock of that corporation ?

A. No, sir.

Q. 27. Did you ever have any talk with him about that subject or relating to his liability as a subscriber to the capital stock of that company ?

A. No, sir.

Cross-examination by Judge JORDAN :

X Q. 28. I observe in the contract marked Exhibit A that part of one of its stipulations is that Mr. Harper is to organize under the laws of Ohio a railroad Co., named the Cincinnati, Columbus and Hocking Valley Railway Co. What did you understand was the purpose of that organization ?

A. I understood that the purpose of that organization was to form a company under the laws of the State of Ohio, with all the re-
sponsibilities of organizing a corporation attached to it under
91 the laws of the State to make it a legal corporation to issue its bonds.

X Q. 29. Did you not understand that the purpose of the organization was that it might be put in a position so that it could issue these bonds to you ?

A. Yes, sir.

X Q. 30. Was not that the object and purpose of the orginization ?

A. Yes, sir.

X Q. 31. Before you made this contract had you not gone up and visited the road?

A. No, sir; I had not seen the road previous to the making of this contract.

X Q. 32. Do you know of any person that went up to see the road in your behalf?

A. No, sir.

X Q. 33. Do you know whether Mr. McHenry was there to see it?

A. I do not know that Mr. Henry saw the road before the making of the contract, of my own knowledge.

X Q. 34. Did Mr. McHenry inform you that he had seen the road previous to the making of this contract?

A. No, sir.

X Q. 35. Has he never informed you of that fact?

A. No, sir.

X Q. —. Did Mr. Eckert inform you that he had ever seen it?

A. No, sir; not to my knowledge up to the present day.

X Q. 37. Had not some agent of yours informed you that
92 he had seen the road prior to the making of the contract?

A. No, sir.

X Q. 38. Had you not sent anybody at all to look at it?

A. No, sir.

X Q. 39. No person whatever?

A. No, sir.

X Q. 40. You knew nothing about it?

A. Our knowledge came originally almost entirely from Mr. Harper and some inquiries made here causually in Cincinnati.

X Q. 41. Of whom did you inquire here?

A. Mr. Wilshire.

X Q. 42. You never sent anybody up to look at the road?

A. No, sir.

X Q. 43. You made a contract, then, without any knowledge of the road, as I understand you, except the representations made to you by Mr. Harper and such information as you could get here from inquiry?

A. Yes, sir; mainly from the information received from Mr. Harper and the statements made by him.

X Q. 44. You did go up to see the road about the time it was substantially used as a standard-gauge road, did you not?

A. I went to Allentown, I think, early in February, 1882—I cannot give the date—to see what was being done and to see if they were doing anything to widen the gauge and to put the road in such condition as Mr. Harper had agreed, under this contract, it should
93 be put in. The road was not completed. The gauge had been widened from Allentown west and a part of the track had been laid and was being laid at that time from Allentown east. I drove as near as I could in a buggy—it was a very wet time—from Allentown to Jeffersonville.

X Q. 45. What distance is that?

A. I went 4 or 5 miles. The grading was done and the track, as

I say, being laid, and the connection was laid with the Ohio Southern at Jeffersonville.

X Q. 46. What other part did you see?

A. I didn't visit any other part of the road, except that I was informed by the engineer in charge there that the track had been widened all the way from Allentown to Claysville Junction.

X Q. 47. You say, then, that a portion of the road was widened from its original construction as a narrow gauge to the standard gauge, do you?

A. Yes, sir.

X Q. 48. And you say you knew the manner in which it was done?

A. Yes, sir.

X Q. 49. Who was with you?

A. No one, sir.

X Q. 50. You went up there entirely alone?

A. Yes, sir.

X Q. 51. Do you know that Mr. McHenry went up there to see it from anything he said or any knowledge you have of the transaction?

A. I know that Mr. McHenry went over the road once on
94 his way to see Mr. Gimperling, expecting to find him there, previous to the gauge being changed.

X Q. 52. How did you learn that fact?

A. From Mr. Gimperling telling me so.

X Q. 53. Was that before or after the contract was made marked Exhibit A?

A. That was after the contract was made.

X Q. 54. Did you ever see it as a narrow gauge after the contract was made?

A. No, sir.

X Q. 55. Did you ever send any person to look at it as — standard-gauge road after it was widened?

A. No, sir.

X Q. —. Did any person go, that you know of, to see it and report to you the fact that he had seen it?

A. Mr. Lahee, who is one of the parties to this suit and who was my partner, went over the road once, but I cannot testify whether he went over it before or after the gauge was changed, but my impression is that it was before.

X Q. 57. Did he report to you that he had been over it?

A. Yes, sir.

X Q. —. Was he your partner?

A. He was previous to this suit.

X Q. 59. Was he your partner in this venture?

95 A. Yes, sir. He is one of the complainants. His name is mentioned in the contract. He is one of the company.

X Q. 60. State whether you did not execute the receipt attached to Exhibit A.

A. Yes, sir.

X Q. 61. And whether you did not receive the bonds pursuant

to the contract after you had examined the road to the extent stated.

A. Yes, sir.

X Q. 62. State whether you were not satisfied from your examination and such information as you availed yourself of at the time you receipted for the bonds that the road had been widened and extended in virtue of the contract.

A. I cannot state that I was not satisfied, and now I will explain what I was going to say before, that when I went to Jeffersonville and Allentown and saw the condition the road was in the time was nearly up for the work to be completed and the bonds to be delivered. There had been no ballasting on the road; the work was in an incomplete condition and unfinished. I went from Jeffersonville back to Allentown and from there down to see Gimperling, who was then president and general manager of the road, and Mr. Gimperling assured me——

96 Judge JORDAN: I object to any statements made by Mr. Gimperling.

Mr. RIDDLE: He is one of the defendants.

Judge JORDAN (to the witness): Go on.

The WITNESS (continuing): Mr. Gimperling assured me, as president and general manager of the road and superintendent of the work, that it should be finished, all of it done in a workmanlike manner, and that the road should be properly ballasted. He assured me in regard to the bridges that he had repaired that they were in good condition, and that, while this work could not be completed at the time specified when these bonds were to be delivered, he would give me his word as ad officer of the road in charge of the work that the work should be continued just as rapidly as the weather would permit; that it would be next to impossible in February and the state the country was in to properly ballast the road, but that it should be done as rapidly as possible, as soon as circumstances should admit of it, and, on these assurances from Mr. Gimperling, I went home and reported this trip of examination, so far as I could make it, and on the 11th of February I executed this receipt.

X Q. 63. Have you ever seen the road since?

A. No, sir.

X Q. 64. What did you consider the value of the road at that time?

97 A. I knew nothing about the value of the property as a piece of railroad property in that position. I knew what other pieces of railroad property were worth, and I was not capable of judging what the earning power of that piece of property was or what it was worth as a railroad. We had been led to believe that it was a valuable piece of property because of its proposed connections and extensions that had been assured by Harper.

X Q. 65. Then it was his best judgment as expressed to you?

A. He expressed to us that it was his intentions and that he had the right of way, and that the grading was done to Mt. Sterling, and his intention was to push it into the coal-fields of the Hocking val-

ley, which would be great feeders to this road. It was to come to Cincinnati over the Little Miami railroad, and be a connecting road with them from the coal-fields of the Hocking valley, which was the inducement for us to accept these bonds. He agreed to show his good faith in the extension of the road; that he himself would extend it to make this one connection with the standard-gauge road, the Ohio Southern.

X Q. 66. Then he claimed to you that by widening it and extending it and making these connections spoken of it would add
98 greatly to the value of the road, or claimed that it would?

A. Yes, sir.

X Q. 67. Did he estimate in any conversation with you what it would cost to widen and extend it?

A. No, sir.

X Q. 68. Did you make any inquiry yourself as to what it would cost to widen and extend it according to the terms of this contract?

A. I don't think I did.

X Q. 69. Did you not inquire of anybody what the value of the road was at that time; for instance, that you made the contract Exhibit A?

A. I asked Mr. Harper in regard to the value of the road.

X Q. 70. Anybody else? I didn't mean him.

A. I asked Mr. Wilshire in regard to the value of the road, and his opinion was that the road would be more valuable as a standard gauge than it was as a narrow gauge. It would increase its value because of the projections that were to be made as feeders to this road at the hands of Harper. It was his opinion that if Mr. Harper carried out this nominal agreement that he made with us or the propositions or reasons that he gave us for accepting these bonds it would make it a valuable property, and that it was not a valuable property as it then stood without any connections except that Dayton connection.

99 X Q. 71. Did you go along the line of the road and inquire of any of the managers or directors of the road or of any of its officers or persons in that neighborhood who had knowledge of it or persons connected with it as to the value of it before you made this contract?

A. No, sir. I will say this: that I was in Claysville and asked a gentleman there, whose name I cannot tell, what his opinion of the road was. His opinion was very low in regard to it in its present state.

X Q. 72. When did you see the gentleman in Claysville?

A. Some time previous to the 12th of October; from the 5th to the 12th.

— Q. 73. What estimate did he place upon it?

A. I don't know that he put any price upon it.

X Q. 74. What did he say to you that led you to believe that it was a low estimate?

A. He thought it was a very poor property; that it would not pay in its then condition; that probably if it were taken hold of and

extensions made as suggested and made into a standard-gauge road that it would make it a valuable property.

Counsel for the complainants move to strike out the preceding question and answer because incompetent under the pleadings and irrelevant.

X Q. 75. Have you parted with any of your bonds that you originally had in this case?

100 A. No, sir.

X Q. 76. You have them all still, have —?

A. As J. W. Preston & Co. I have not. A portion of the bonds belong to Preston and McHenry. I have parted with their part—part of the other parties to this suit.

X Q. 77. What was your business at the time that this contract marked Exhibit A was made?

A. I was in the commission business at Chicago—the general commission business.

X Q. 78. What was the character of your business?

Counsel for the complainants objects to the question and the answer as not relevant in this issue at all.

A. At the time this contract was made I was not in business at all.

X Q. 79. What business had you previously been engaged in for the last year or two in Chicago?

A. I had been in the general commission business.

X Q. 80. What do you mean by the general commission business in Chicago?

Counsel for complainants objects to the question.

A. The duying and selling of grain and provisions and other articles dealt in on the Chicago board of trade.

Counsel for the complainants move to strike out the previous question and answer.

The further taking of this evidence was adjourned over until Friday, July 24, 1885, at 10 o'clock.

101 FRIDAY, *July* 24, 1885.

The further taking of this evidence was resumed pursuant to adjournment, the witness, J. W. PRESTON, being on the stand for further cross-examination, and all the counsel present:

Q. 81. The other parties to the contract marked A had been engaged in a like business, had they not, in Chicago?

Counsel for the complainants objects to the question.

Question continued. Dealing on the board of trade in grain and provisions?

Same objection.

Mr. RIDDLE: The witness need not answer that question.

Judge JORDAN: Do you instruct the witness not to answer?

Mr. RIDDLE: Yes, sir; the question is irrelevant entirely, and has no competency under the pleadings in this case.

Judge JORDAN: I desire my statement to appear in the record. I propose to show that all the parties to this contract were engaged in Chicago as brokers and commission merchants dealing on the Chicago board of trade in grain and provisions.

Question repeated in modified form. Had not you and the
102 other parties to *to* the contract marked A had dealings with Mr. Harper in the buying and selling of produce and grain upon the Chicago board of trade?

Counsel for the complainants renew- his objection.

A. Yes, sir.

X Q. 82. You had had dealings, had you not?

A. Yes, sir; with all except Howard, Eckert & Co.

X Q. 83. Were not Howard, Eckert & Co. brokers and commission merchants in Cincinnati dealing with the parties to the contract on the Chicago board of trade?

A. Yes, sir.

X Q. 84. State whether the consideration claimed to have been received by Mr. Harper for the bonds which he agreed by this contract to secure or transfer to the parties to the contract did not grow out of the dealings between Harper and the contracting parties on the Chicago board of trade.

Counsel for the complainants objects to the question on — ground that the contract speaks for itself.

Judge JORDAN: Shall the witness answer the question?

Mr. RIDDLE: No.

Judge JORDAN: Instructed not to answer by counsel for the complainants.

Mr. RIDDLE: The pleadings show that the bills are filed
103 upon certain judgments rendered in the United States circuit court, in which this suit is pending, and cannot be collaterally impeached or inquired into; therefore I instruct the witness not to answer the question.

Judge JORDAN: The respondents' counsel offer to *to* show by the witness that the contracting parties had dealings on the Chicago board of trade; that the books of the company of brokers in Chicago will not show the amount of dealings which they claimed and which they presented accounts to Mr. Harper in settlement for; that the entire transaction was disputed and repudiated by E. L. Harper as fraudulent; that he had been improperly dealt with; that the claim was exaggarated, and that it was in settlement of this fictitious claim that a compromise was had by which this road was to be extended and widened and the Chicago brokers were to take the bonds in settlement of the disputed claim.

Redirect examination by Mr. RIDDLE:

Q. 85. What representations, if any, Mr. Preston, did Mr. Harper

make to you after the execution of the contract of Oct. 12,
104 1881, in regard to his proposed development and extension of that road?

Counsel for the respondents objects as forming no inducement to the contract.

A. During the spring and summer subsequent to the execution of the contract—in 1882—Mr. Harper represented at all times when I saw him that arrangements were being perfected to extend this road to the coal fields, and that he was negotiating and making arrangements with the parties to do so, and that he believed the bonds of the road would be good; that the property would be good paying property through its connections and feeders, reiterating the statements that he had made previous to the execution of the contract. Subsequent to that time or subsequent to 1882 I saw very little of Mr. Harper. I was away a great deal of the time.

Q. 86. Did he ever make any representations to you as to the value of these bonds after they were delivered to you?

Counsel for the respondents objects to the question as incompetent.

A. I don't know that he ever put any money value upon the bonds, any more that to say, as I repeated in my former answer, that he believed they would be eventually good bonds; have a valuable consideration.

Q. 87. Do you know John L. Pfau?

A. I do not know him.

X Q. 88. Do you know E. Snowden?

105 A. No, sir; I do not know him; I might have seen him.

Q. 89. Do you know J. H. Matthews?

A. I have met Mr. Matthews; I have been introduced to him.

Q. 90. Do you know D. P. Hyatt?

A. I have met him and been introduced to him.

Q. 91. Do you know W. H. Harper?

A. Very well, sir.

Q. 92. Do you know W. C. Herron?

A. I do not.

Q. 93. Do you know the relations of any of these parties to E. L. Harper, the defendant—what relation they sustain to him?

A. My information in regard to these gentlemen—those whom I have met—comes from meeting them in his office and apparently in his employ. To the best of my knowledge and belief, they were all in his employ.

Q. 94. The bill in this case makes, among others, Charles J. Gilbert, William T. Baker, Murray Nelson, Abraham Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, complainants. State, if you know, whether they came into the possession of the bonds upon which judgments were rendered and set out in this bill of complaint.

Counsel for the respondents objects to the question.

A. The bonds held by the parties named came into their possession through the firm of Preston & McHenry.

Q. 95. What were they given to them for?

Counsel for the respondents objects to the question.

106 A. These bonds were in payment or part payment of an indebtedness to the various parties from Preston and McHenry, resulting from their failure on the 1st of October, 1881.

Q. 96. About when did they receive these bonds?

Counsel for the respondents objects to the question.

A. About the 15th of Feb., 1882.

Q. 98. Did the complainants or any of them have any knowledge of the manner in which or the steps taken or of the transactions appertaing to the organization of the Cincinnati, Columbus and Hocking Valley Railway Co. at any time until after the appointment of the receiver in the suit of the Union Trust Co. against the railroad Co. aforesaid?

Counsel for respondents objects to the question.

Question modified, except such as was obtained from the contract of Oct. 12, 1881, Exhibit "A" herein.

Same objection.

A. No, sir; they had no such information, to the best of my knowledge.

Recross-examination by Judge JORDAN:

X Q. 98. Then the persons to whom the bonds were transferred knew at the time that the bonds were transferred to them of the contract, Exhibit A?

A. Yes, sir.

(Signatures of witnesses waived by consent.)

107 WILLIAM E. MCHENRY, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. RIDDLE:

Q. —. Are you one of the complainants in this case?

A. I am.

Q. 2. And live in Chicago?

A. Yes, sir.

Q 3. Do you know E. L. Harper?

A. Yes, sir.

Q. 4. Do you know the Cincinnati, Columbus and Hocking Valley Railway Co.?

A. Yes, sir.

Q. 5. Do you know John L. Pfau?

A. Not personally.

Q. 6. Do you know the defendants generally in this suit?

A. Well, with the exception of E. L. Harper and W. H. Harper—I think they are the only ones I know personally, though I possibly may have met some of the others when they were giving their testimony before Master Wilby.

Q. 7. Do you know W. H. Matthews?

A. Only in the way I have mentioned.

Q. 8. Do you know D. P. Hyatt?

A. In the same way.

Q. 9. Do you know W. H. Harper?

A. I know him.

108 Q. 10. Do you know W. C. Herron?

A. In the same way that I know the others.

Q. 11. Do you know Louis Seasongood?

A. I don't know him.

Q. 12. Do you know W. D. Lee?

A. I don't — him.

Q. 13. Do you know John F. Gimperling?

A. I know him.

Q. 14. What relation, if any, do Pfau, Snowden, Matthews, Hyatt, W. H. Harper, Herron, and John E. Gimperling sustain to the defendant E. L. Harper?

A. To the best of my knowledge and belief, they are all employees of Mr. Harper.

Q. 15. Were they at the time they made their subscriptions to the capital stock of the Cincinnati, Columbus and *and* Hocking Valley Railway Co., as shown by the book which I hand you and which is marked Exhibit B of the testimony in this case, employees or clerks of Mr. Harper?

(Witness examines books referred to in question.)

A. To the best of my knowledge and belief, W. H. Harper was a partner of E. L. Harper, and, with the exception of Mr. Gimperling and Mr. Seasongood, I believe that all the rest of them were in his employ in some capacity.

Q. 16. Have you heard them so state at any time since that they were in his employ.

109 A. My recollection of their evidence before Master Wilby is that they were.

Q. 17. Do you know anything about the organization of the Cincinnati, Columbus and Hocking Valley Railway Company and of E. L. Harper's connection and management of it? If so, state what you know about it.

A. I know nothing whatever of it except that in a certain contract to which I was a party, made with Harper, it was a corporation to be organized under the laws of the State of Ohio, and further than that I know nothing of it; anything more than that my knowledge from being in this suit has led me to believe that the railway company and Harper were one.

Counsel for respondents objects to the answer.

Q. 18. Do you mean from this particular lawsuit alone or from your connection with the litigation relating to the Cincinnati, Columbus and Hocking Valley Railway Co.?

A. My general connection with the whole matter.

Counsel for the respondents make the same objection.

Mr. RIDDLE: Both questions and answers may be stricken out.

Judge JORDAN: I object to the striking out of the questions and answers both.

Q 19. Have you had any other relations or business transactions which have brought to your knowledge any facts in connec-
110 tion with the Cin'ti, Col. and Hocking Valley Railway Co. except this suit, this present suit? I refer to your entire transactions.

A. Nothing whatever.

Q. 19. You have been connected with no other litigation regarding that road?

A. I was connected with the suits by which the judgments was obtained by the road.

Q. 20. Any other suits?

A. Nothing that I know of, by which suits we recovered judgments against the road on the bonds of which I was the owner.

Q. 21. Did you have any connection with the suit to foreclose the mortgage on the road?

A. Yes, sir.

Q. 22. You mean by this suit all the litigation touching this matter of the railroad?

A. Yes, sir; everything touching the railroad and my connection with it. That is what I mean.

Q. 23. Now, when did you first know of the manner in which Mr. Harper had proceeded in the organization of the Cincinnati, Columbus and Hocking Valley Railway Co.?

A. After the suit to foreclose was commenced, we obtained possession of the books of the company.

Q. 24. Did you get what knowledge you have of Mr. Harper's connection with what organization from the books and papers delivered to the receiver in this suit?

111 A. Yes, sir.

Q. 25. Had you at any time previous to that had any communication or any knowledge communicated to you by Mr. Harper, or by any of the officers or stockholders of that company touching the manner in which it had been organized?

A. None whatever.

Q. 26. I wish to call your attention to Exhibit C of the testimony in this case, found upon page ten of that exhibit, and to ask you when you first had knowledge of that portion of Exhibit C, being the proposition made by E. L. Harper to the board of directors of the Cincinnati, Col. and Hocking Valley Railway Co.

A. I cannot remember the date accurately.

Q. 27. About when?

A. It was very soon after the receiver obtained possession of the books of the company.

Q. 28. It was the time of the examination over before Wilby?

A. It was somewhere along there; it was the first time I saw the book.

Q. 29. You never knew of that transaction before?

A. I never heard of such a thing until I saw it there.

Q. 30. Did you ever before that time know of the way in which the subscribers to the capital stock of the defendant railway corporation had attempted to pay for their subscriptions to that capital stock? I mean prior to the time of the examination before Mr. Wilby, May 16, 1884.

112 A. No, sir.

Q. 31. You had no knowledge, then, of the manner in which E. L. Harper had fulfilled his contract of Oct. 12, 1881, or of the history of the transactions relating to the organizations of the defendant railway corporation until about the time of the examination before Mr. Wilby?

A. I had not.

Q. 32. What connection had the other complainants in the bill, Chas. J. Gilbert, Murray Nelson, William T. Baker, Abraham Poole, William A. Kent, Selah Young, Jr., and James S. Sherman, with the ownership of any of the bonds and how did they come into the possession of them and when?

A. They came into the possession of them somewhere about *where*, on Feb. 15, 1882, receiving them in payment for an indebtedness of Preston and McHenry.

Q. 33. Did they know anything about the Cincinnati, Columbus and Hocking Valley Railway Co., except such knowledge as they had from the contract made between the parties, which is marked A of this testimony?

A. None to my knowledge.

Q. 34. Did you ever have any conversation with E. L. Harper concerning his liability as a subscriber to the capital stock of the defendant railway corporation?

A. Of his liability?

Q. 35. Concerning his liability on account of it. Did you

113 ever have any conversation with him about it, even at any time?

A. None concerning his liability.

Q. 36. Did you ever have any agreement with him to release him from his liability as a stockholder?

A. None whatever.

Q. 37. Did he ever mention the subject to you at any time or in any way?

A. He did not.

Q. 38. Did he ever ask you to take any stock, either you or any of the members of your then firm to take any stock in this corporation?

A. Yes, sir; he did.

Q. 39. What was that conversation?

A. He wanted us to take a large block of the stock and become officers of the company.

Q. 40. That is what he said to you?

A. Yes, sir.

Q. 41. What did you say to him?

A. We refused it point blank on the ground that we did not desire to incur any stock liability.

Counsel for the repsondents objects to the answer.

Q. 42. Was that a part of your conversation with him?

A. Yes, sir; that was a part of the conversation with him.

Q. 43. If there was anything else stated at the time state it fully.

114 A. There was considerable conversation, but the substance of it was as I stated. We declined to take the stock on account of the liability. We refused to have anything to do with the stock.

Q. 44. Who were present at that conversation?

A. Mr. Preston. I think Mr. Wilshire was present. I would not swear positively, but it is my impression that he was; he was present at many of the conversations. E. L. Harper was present.

Q. 45. What did Preston say in that conversation?

A. He stated substantially as I did. He refused to have anything to do with it on account of the stock liability.

Q. 46. Did he say that to Mr. Harper?

A. Yes, sir.

Q. 47. That was the only conversation you ever had with Mr. Harper touching the question of stock in the defendant railway company?

A. In any way, shape, or form.

Cross-examination by Judge JORDAN:

X Q. 48. When did Mr. Harper request you to become a stockholder, so that you might be a director in the organization of the road, and where?

A. It was *a* somewhere in October, the latter part of Sept. or 1st of Octo., 1881, in his office in Cincinnati, in his private office.

X Q. 49. Was that before or after the contract was made?

115 A. That was before the contract was made; while we were negotiating about it. That is my recollection of it now.

X Q. 50. Did you have any correspondence with Mr. Harper?

A. You mean in relation to this question you have just asked?

X Q 51. Yes, sir.

A. No, sir.

X Q. 52. When did you first learn that the road had been organized pursuant to the contract in Exh. "A"?

A. I suppose really the first knowledge I had on that subject was when I came to Cincinnati in February, 1882, to receive the bonds under the contract. I didn't know then, of my own knowledge, that it was done any more than I supposed it was.

X Q. 53. Did you have any correspondence with him from the time the contract was made until you came here in February?

A. No, sir; not that I remember of.

X Q. 54. You made no inquiry of Mr. Harper in regard to it?

A. Not that I remember of.

X Q. 55. You entrusted the organization entirely to him?

A. Counsel for the complainant- object to the question.

A. Yes, sir.

X Q. 56. When did you first visit Cincinnati on the subject of this contract?

116 A. Somewhere in the latter part of Sept. or the 1st part of October, 1881.

X Q. 57. When did you next visit Cincinnati on the subject of this contract?

A. I don't think I came after the signing of the contract until the bonds were received; I don't think I was here; I have no recollection of being here.

X Q. 58. Were you here at any time prior to the time the contract itself was executed?

A. We were here several times during the latter part of Sept., from the 29th of Sept. up to the time the contract was signed.

X Q. 59. And then at the time it was signed you were here?

A. Yes, sir.

X Q. 60. And the subject-matter of taking these bonds was under consideration *or* several weeks before the making of this contract?

A. For several weeks? No, sir. The failure occurred on the 29th of September, and the contract was signed on the 12th of October, and it must have been between the dates. I was not here all that time; I was back and forth.

X Q. 61. About how long prior to the 12th of October was the subject of the organization of this company, the widening and extending of the road, and your taking these bonds submitted to you for consideration?

A. It was several days; I don't remember just the exact time; somewhere along there; possibly a week; I don't remember;

117 possibly not so long; possibly a little longer; it all happened in there between these dates.

X Q. 62. Did you make inquiries touching this road as it then existed?

A. Very few.

Q. 63. Of whom did you inquire, if of any one?

A. Mainly of Mr. Harper himself; possibly I had some conversation with J. W. Wilshire regarding it. Mr. Preston and I went to Waynesville together, as he testified, and met some man there whose name I don't remember and whom I should not remember if I should see him.

Q. 64. Did you go and look at the road prior to making the contract?

A. No, sir.

Q. 65. Then you did not go on any part of the road nor to any of its officers or managers or persons connected with the road to in-

quire in regard to the character of the road before making the contract?

A. No, sir.

Q. 65. But contented yourself in making the inquiries that were made right here in Cincinnati?

A. Largely. It depended almost entirely upon Mr. Harper's representations regarding the road, its value, present and prospective, at that time.

Q. 67. How soon after the making of the contract did you and Mr. Preston go to Waynesville?

118 A. I have testified that we went to Waynesville previous to the signing of the contract. I think that that was previous that we went there together; that is my recollection of it now.

Q. 68. Then you did go to Waynesville and ask a gentleman there prior to the making of the contract?

Counsel for the complainants object to the question as immaterial.

A. That is my recollection.

X Q. 69. What was the purpose of your visit to Waynesville?

Counsel for the complainants objects to the question.

A. To try and see, if possible, something about this railroad.

X Q. 70. You say you saw a gentleman at Waynesville. Did you ever meet him before?

A. No, sir.

X Q. 71. Had he been in the railroad business?

A. Not to my knowledge; simply a resident of that section of the country.

X Q. 72. Was he not a spare and sandy-complected person?

Counsel for the complainants objects to the question.

A. I could not tell you to save my life.

X Q. 73. Have you not ascertained that his name was Haines?

A. No, sir; not anything more than what I said here

119 yesterday.

X Q. 74. Where is Waynesville?

Counsel for the complainants objects to the question.

A. It is in Ohio.

X Q. 75. How near is it to the west end of this road?

A. That I could not tell you.

X Q. 76. It is in Warren county, I believe.

A. I don't know what county it is in.

X Q. 77. It is a little on the north of the Little Miami railroad, is it not?

A. I believe it is—that is, we went in some direction that night from the Little Miami railroad. I could not tell you in what direction it was.

X Q. 78. Did you go and inquire of anybody else save this gentleman at Waynesville?

A. Not to my recollection.

X Q 79. Did you leave Cincinnati for the purpose of making these inquiries touching this road; was that the purpose for which you left Cincinnati?

A. Yes, sir.

X Q. 80. You did not go, then, to Washington Court-House to inquire about it?

A. No, sir.

X Q. 81. You did not go to see the president or directors of the road to inquire about it?

A. Not at that time.

X Q. 82. You did not go along the line of the road to inquire about it?

A. No, sir.

120 X Q. 83. Did you get off the Little Miami railroad and take a buggy at night and go to Waynesville and inquire of a man you had never seen, and do you say that that was the only inquiry you ever made?

A. With the exception of the fact that we had to walk instead of taking a buggy.

X Q. 84. Walk the entire distance from the Little Miami railroad to Waynesville?

A. Yes, sir.

X Q. 85. Did you after the contract was made and while it was a narrow-gauge road go upon the line of the road or see it?

A. No, sir.

X Q. 86. How soon thereafter did you?

A. I could not tell you.

X Q. 87. Did you go upon the line of the road or see the road after it had been widened into a standard gauge or after any part of it had been widened?

A. No, sir.

X Q. 88. Then you saw the road after it was a narrow gauge?

A. No, sir; I saw it as a narrow gauge only.

X Q. 89. Had you ever been in the railroad business?

A. No, sir.

X Q. 90. What information did you receive from this gentleman touching the character of the road?

A. Well, sir, I cannot remember anything about it at all. I could not swear as to what he said. I was in a very unhappy frame of mind, and I was not paying very much attention to *to* anything. I could not swear what he said.

121 X Q. 91. Were you capable yourself of forming a judgment as to the value of the road when you saw it?

A. No, sir; I should not say that I was, not being an expert in railroad property. You are talking about it as a narrow-gauge property, as it was when I saw it?

Judge JORDAN: Yes, sir.

Redirect examination by —— ——:

None.

(Signature waived.)

122 J. W. PRESTON recalled.

Examination by Mr. RIDDLE:

Q. 1. Did you ever have at any time any conversation with Mr. Harper in regard to taking some of the stock of the defendant railway corporation?

A. Yes, sir.

Q. 2. What was that conversation, who were present, and about when did it take place?

A. It took place between the 8th and 12th of October, 1881, during the negotiations out of which this contract was the result. In making the offer of these bonds, the first and second mortgage bonds, which are named in the contract, he offered to let us have a large block of the stock; also proposed to let us have it, and, if we would take it, make us officers in the railway company.

Q. 3. What did you say?

A. I objected to taking the stock because of the peculiar stock liability in the State of Ohio. I didn't propose to become responsible for the amount of stock that I might subscribe to the railroad Co.

Q. 4. Did you communicate at that time that objection to Mr. Harper?

A. I did; I saw him and made that objection.

Q. 5. Made it to him?

A. Made it to him.

Q. 6. You so stated to him?

A. Yes, sir; I so stated to him.

Q. 7. Who was present?

123 A. My recollection is that Mr. McHenry, Mr. Harper, and Mr. Wilshire, I think, were present. I am not so certain about Mr. Wilshire, but I think he was there. He was present mainly at the interviews we had with Mr. Harper.

Cross-examination by Judge JORDAN:

X Q. 8. Did you receive any letters from Mr. Harper touching this transaction?

A. I never have received a letter from Mr. Harper touching this transaction in any way whatever.

X Q. 9. I observed several letters here in the hands of your counsel. What letters are they?

A. They are not letters directed to me. I don't know what letters they had. I simply state that I never received any.

X Q. —. Do you know of your counsel having letters written by Mr. Harper to any of the parties relating to this transaction?

A. I have not seen any.

X Q. 11. Do you know whether there are any letters written by Mr. Harper to any of the parties connected with this transaction?

A. I think he wrote 2 or 3 letters in regard to it.

X Q. 12. Have you seen them since you came to Cincinnati?

A. No, sir.

(Signature waived.)

124 Adjourned with the understanding that notice is to be given when the parties are ready to proceed and take further testimony on behalf of the complainants.

SEPTEMBER 12, 1885.

Met pursuant to notice.

Present: Messrs. Riddle, Paxton and Boyce, for the complainants.

The taking of further testimony in this cause was postponed until half past 10 o'clock a. m., on Monday, September 14th, 1885.

MONDAY, *September 14th*, 1885.

The further taking of testimony in this cause was resumed at 11 o'clock a. m., pursuant to the above adjournment.

Present: Messrs Paxton and Boyd, for the complainants, and Judge Jordan, for the defendants.

RALPH PETERS, a witness called on behalf of the complainants, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. PAXTON:

Q. 1. Please state your age, residence, and occupation.

A. I am 32 years of age; reside in Cincinnati, Ham. Co.,
125 Ohio, and am superintendent of the Little Miami division, Pittsburgh, Cincinnati and St. Louis R. R. Co.

Q. 2. How long have you been engaged in the railroad business?

A. For 11 years.

Q. 3. Are you familiar with the construction and management and operation of railroads?

A. I think I am.

Q. 4. State what knowledge, if any, you have of the Cincinnati, Columbus and Hocking Valley railroad.

A. I have been over the road once, and I have heard more or less of the road from parties who were interested in it. The road connects with our Little Miami division at Claysville Junction, about 3 miles east of Corwin, in Warren county. It runs eastwardly from our line about 28 miles. I first knew of the road in 1881, from Mr. J. E. Gimperling, of Dayton, who was put in charge of the road to reconstruct it and put it in condition for operation.

Q. 5. State what you observed in passing over the road in regard to the character of the construction, and you may state generally what kind of a road it is.

A. The parties who controlled the road desired to have it operated by our company, and after considerable correspondence and solicitation pressed our manager, Mr. McGrea, of Columbus, to
126 make an inspection of it with me. On the 8th of Aug., 1883, we passed over the road from Claysville Junction to Jeffersonville and returned the same day. We found a very poor road; very badly constructed, with heavy grades, only temporary work in the culverts and trestles. The embankments were narrow and the cuts very narrow; the ditching in bad shape. It had originally been built as a narrow-gauge road, the gauge ties—a few

standard-gauge ties being put in, probably six to each rail, the balance of the ties under each rail being the original ties that were put in when the road was first constructed as a narrow gauge. We were very much disgusted with the trip and considered it a day lost. When we arrived at Jeffersonville we endeavored to get back to our own line by another road, but, finding that we could not make connections, we returned by way of Claysville Junction. Mr. McCrea and myself both told Mr. Hyatt, who accompanied us, representing the Cincinnati, Columbus and Hocking Valley road, that we would have nothing to do with it and gave him no encouragement towards making an alliance with our company. The rail that was laid on that road was from 30 to 40 pounds. It was entirely too light for the traffic of a standard-gauge road. They had no water stations, no station buildings that amounted to anything, and seemed to have little or no business.

Counsel for the defendants objects to the answer as incompetent.

127 Q. 6. State your observation in regard to the character and nature of the trestle-work, culverts, and bridges that you observed on the road; state how they were constructed and the character of the material.

A. The trestle all seemed to be in good condition. They had been overhauled by parties who had reconstructed the road, but they were too light for any heavy traffic. The culverts were of timber. Many of them had been washed out or had caved in and were only repaired with old ties.

Q. 7. Did you observe the character of the wood that was used?

A. As far as I could see they had used white-oak or oak timber.

Q. 8. State from the observation that you made and from the information that you have with reference to the character of the construction and location of this railroad what was its reasonable cash value in the latter part of 1881 or early part of 1882.

A. I don't think I am competent to testify to that fact, as I was not over the road in that time. I was there in 1883.

Q. 9. State what you considered its value at the time you made this inspection.

A. I should consider that the only thing valuable about it would be the rails and materials on the road; of course there is a large amount of work there that represents money, and that would have to be given to give a correct valuation of the road.

A. I am asking as a railroad. What was it worth as a
128 railroad, as an enterprise?

A. As a railroad it might be worth a good deal more than it was as an enterprise—as a business venture.

Q. 11. That is what I am getting at.

A. I should say that the road, take it as we found it, that anybody wanting to keep it as a railroad it was worth at least four thousand dollars per mile.

Q. 12. You may state what it was worth as a railroad enterprise or business venture for the purpose of making or earning money to its owners.

A. I don't think I would have valued it at more than two thousand dollars per mile. That is about the scrap value of the material in it.

Q. 13. The estimate that you have fixed of its value at the time of your visit would be the same estimate that you place on it in the latter part of 1881 or early part of 1882, provided the railroad was then in the same condition, is it not?

A. I cannot answer that just exactly. It could not have been in the same condition, because that had the effects of two winters upon it which ran the road down considerable. The timber was older; the iron had had the traffic of two years upon it, and the embankments in all had suffered the wear of the weather for two winters and were considerably cut and damaged.

X Q. 14. State if the road has been operated in late years;
129 and, if so, state in what manner.

A. Well, it was operated in 1884, for a portion of the year from June or July, I think, until the end of the year, or possibly from the 25th of June, 1885. At that time I rented the parties a locomotive. Mr. Kirk was operating the road for the receiver and gave us at the junction some four or five hundred cars of freight, using our cars for handling freight over his road.

Q. 15. Since then?

A. There was nothing done with the road until about the 1st of July this year. Since that time some parties have been operating it, using the locomotives which they have had repaired. They are giving us probably 50 or 60 cars per month. They were not able to earn the amount that we charged for the locomotive. We had to reduce our bills and take what we could get.

Q. 16. Has the traffic, since you have been familiar with it, been sufficient to produce any earnings and to maintain and keep the road in proper condition, if you know?

A. I do not know.

Cross-examination by Judge J. A. JORDAN:

X Q. 17. Are you acquainted with Mr. Preston or Mr. Mc-
130 Henry or any other plaintiffs to this suit?

Counsel for the plaintiffs object to the question.

A. I think I have met them; simply been introduced to them.

X Q. 18. Have you ever met them along the line of the road?

Counsel for the plaintiff- object to the question.

A. No.

X Q. 19. When you put an estimate of four thousand dollars per mile upon the road did you take into consideration all the embankments that have been made upon the road, and also of the right of way and the iron, material, bridges, culverts, and the possibilities and probabilities of extending and making connections with other roads?

A. No; I simply put that valuation on it as it stands. I did not consider any possibilities at all.

Redirect examination by Mr. BOYD:

Q. 20. You considered everything else, did you not, named in that question beside the possibilities or probabilities of which Judge Jordan spoke?

A. I did not consider the right of way, because that was a matter I knew I was not familiar with, not knowing the quantity of it. The land, of course, is worth so much per acre, and you have got to know the number of acres in the right of way before you can estimate the value of the right of way.

131 Q. 21. What are the possibilities and probabilities of this road?

A. That is a little bit more than any railroad man at the present day can answer. We have too many railroads at present. There is no use for a great many of them, and this is one of the number; but if I could look far enough into the future I might be able to answer more intelligently. Some time in the future it might be a very valuable property, for this great American people is continually growing and spreading.

Q. 22. But its probabilities are not very flattering now?

A. Not at present.

(Signature of the witness waived.)

132 W. T. ROSENBARGER, a witness called on behalf of the complainants, being duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. PAXTON:

Q. 1. You may state your age, residence, and the business in which you have been engaged in late years.

A. I am 41 years old, and I live at Xenia, Ohio. I have been railroading for the last 18 or 19 years, but the last railroading I did was the train service upon that Grasshopper road, and now I am on the Little Miami railroad, running as baggage master on that road. Prior to that I had been a telegraph operator.

Counsel for the defendants objects to the term Grasshopper road.

Q. 2. State what connection you have had with the Cincinnati, Columbus and Hocking Valley Railroad Co., and in what capacity you have been acting with reference to the same.

A. I was first sent there to the Little Miami Claysville Junction for both parties, the Cincinnati, Columbus and Hocking Valley railroad, and also for the Pan Handle. I was there until last January, the 26th, as agent, and commenced in June, the 5th, to run a train and kind of oversee the business a little under Mr. Kirk's management as receiver.

Q. 3. State if you are familiar with the road and with its
133 operation and the character of the materials of which it is composed.

A. Well, I ought to be tolerably well acquainted with it. I was ten months running right over the track every day.

Q. 4. State the character of the construction of the road and its condition when you were there.

A. In what way do you mean?

Q. 5. State how it was built, the fills and the cuts and the bridges and the grade.

A. The cuts and fills are narrow, not sufficient, really, for a standard-gauge railroad, and more or less full of mud on the ditch side. Each side of the ties are filled up with mud and stuff like that. The grade is steep—that is, for the first five miles. Outside of that the grade is pretty uniform. It is what you may call a pretty level road. After the first five miles from the river it would average pretty well. The ties, a great many of them, are too short, there having been a few long ties put in, on an average of five long ties to the rail. That would be about five in thirty feet, and the balance is filled in with narrow-gauge ties, a great many of them broken and filled up with all kinds of scrap. The rails—we term it kink—are kinked, all bent up, crooked up, but, as to battered rails, I don't believe there is a dozen narrow-gauge rails battered in the road. I don't know their exact weight. They are small
134 iron, whatever that may be. I don't know what their weight is. I didn't have any use to find out. There is four miles—from Allentown to Jeffersonville—that is laid with all second-class iron; standard iron it is called. It is not really standard iron, either; it is heavier than those are. I don't know what the weight is.

Counsel for the defendants objects to the answer as incompetent.

Q. 6. What do you mean by the term second class as applied to the 4 miles referred to? Do you mean it has been used before?

A. No, sir; it is a new rail, but I don't think the rail is good. It is rather soft; at least it shows up that way. It wore out before the little iron did—that is, the portion used on the west end.

Q. 7. State the character of the trestles and the bridges that are on the line of this road with reference to their use as a standard-gauge road—standard-gauge engines and cars.

Counsel for the defendants objects to the question.

A. They are poor, very poor for any kind of an engine at the present time.

Q. 8. How were they in the early part of 1882, when you first went there?

A. They were not very good, but we made out to use them. We repaired some of them up.

135 Counsel for the defendants say that his objection is to all the examination of the witness touching the fulfillment of the contract between Messrs. Preston and Harper by which the road was widened and extended.

Cross-examination by Judge J. A. JORDAN:

X Q. 9. Are you acquainted with Mr. Preston or McHenry, or and of these plaintiffs?

Counsel for the plaintiffs object to the question as not proper.

A. I never saw any of them that I know of.

(Signature of the witness waived.)
Adjourned until further notice.

136 THURSDAY, *October* 15, 1885.

Met pursuant to notice issued by Jordan and Jordan, counsel for the defendants, at the office of defendants' counsel.

Present: Messrs. Riddle, Boyce and Paxton and Warrington, counsel for complainants, and Messrs. Jordan and Jordan, counsel for defendants.

After waiting from eleven in the morning until four in the afternoon for the examination to commence, by agreement of counsel, an adjournment was had until Friday at 9 o'clock a. m., October 16, 1885.

FRIDAY, *Oct.* 16, 1885.

Met pursuant to adjournment, Messrs. Riddle and Warrington present for complainants and Jordan and Jordan present for defendants

Before the examination began Judge Jordan announced the following agreements of counsel:

1. It is agreed that the contract marked Exhibit A of Oct. 12, 1881, is the original contract between Harper, Preston, McHenry, and others, the same having been offered in evidence by the complainants.

2. It is agreed that the certificate of incorporation was prepared for the secretary of state Nov. 4, 1881, a copy of which is offered in evidence as Exhibit "B" by the complainants.

3. It is agreed that the secretary of state on Nov. 7, 1881,
137 issued the certificate of incorporation as offered in evidence by the complainants shown in Exhibit "B."

4. It is agreed that on Nov. 9, 1881, a notice was published that on Dec. 10, 1881, there would be a meeting of stockholders, as shown in Exhibit "B."

5. It is agreed that on Dec. 10, 1881, books were opened for subscription to the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Co., and that subscriptions were made as stated in Exhibit B and by the parties whose names appear there as subscribers.

Judge JORDAN: Now, I want it to appear that on Dec. 13, 1881, an election was had for directors as part of your exhibits; that there was a meeting for the election of directors, as appears upon Exhibit C, page 1.

Mr. RIDDLE: No; I will not. I will admit that our Exhibit C is

a part of the minute book of the corporation. I don't know whether there was more than one man at that meeting or not, as a matter of fact.

Judge JORDAN: It is agreed that Exhibit C is the minutes of the company.

Mr. RIDDLE: It is a portion of the minutes.

Judge JORDAN: That the whole of Exhibit C is a minute book of the company—a journal of the proceedings of the company. It is a book of the minutes of the corporation.

Mr. RIDDLE: Yes, sir. (After a pause:) I believe Exhibit C is a book in which the corporation kept a record of its transactions.

138 E. L. HARPER, one of the defendants, being produced and duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Judge JORDAN:

Q. 1. Mr. Harper, you may state whether you made a proposition of any kind to the railroad company in pursuance of your contract. I simply want to know whether you made a proposition to them; and, if so, whether it appears upon the books of the company; and, if so, where.

(Witness handed a book and told to look at that.)

A. Yes, sir.

Q. 2. And it appears upon the minutes of the company, page- 10 and 11?

Ans. Yes, sir.

Q. 3. You can state whether that proposition was accepted.

Counsel for the complainants objects to the question.

A. Yes, sir.

Counsel for the complainants moves to strike out the answer because it shows it is the conclusion of the witness.

Q. 4. State whether you were at any meeting of the board when that proposition was accepted.

Counsel for the complainants objects to the question.

A. Yes, sir.

139 Counsel for the complainants moves to strike out the answer for the same reason.

Q. 5. You may state whether you made any conveyance of the road to the company in pursuance of that proposition and acceptance.

Mr. RIDDLE: I object to that; the answer admits it.

A. Yes, sir.

Q. 6. State what you did.

A. I deeded the entire road and franchises to the company.
Q. 7. To what company?
A. The Cincinnati, Columbus and Hocking Valley railroad.

Mr. RIDDLE: We want the deed; that is the best evidence.

Q. 8. About when did you make that conveyance, to the best of your recollection?
A. I think it was in January, 1882, but I could not tell the date.
Q. 9. State now whether the company issued bonds.
A. Yes, sir; they issued me bonds.
Q. 10. State how the bonds were issued; how secured.
A. They issued first-mortgage bonds.
Q. 11. To whom?
A. I got the bonds, but they had to be approved by the trust Co.

Counsel for the complainants objects to the question and answer and move to strike them out.

140 Q. 13. State what was done.
A. I don't think I understand you.
Q. 14. State what was done in the issuing of the bonds, the mortgage, and to whom and what for—what was done by the company in pursuance of the contract that you made with them by which you conveyed the road to the company. What did the company do?
A. They delivered the bonds to the trust company, and when the trust Co. certified to the bonds they delivered them to me.
Q. 15. Did they also execute mortgages?
A. Yes, sir; to the trust Co. to secure the bonds.
Q. 16. State, Mr. Harper, what you did towards the fulfillement of that contract with the corporation in the extending and widening of the road.

Counsel for the complainants objects to the question on the ground that it is both leading and suggestive.

Question modified: State if you did anything.

Counsel for the complainants objects to the question.

A. I constructed the road in accordance with the contract.
Q. 17. You may state whether the company accepted of the work after it was constructed, as you claim, according to the contract.
A. Yes, sir; they accepted it.

Judge JORDAN: We also offer the minute book in evidence, Exhibit C of the complainants.
141 Mr. RIDDLE: All of it?
Judge JORDAN: We offer now that portion which has been offered by the other side. We will determine hereafter whether there is anything else in it necessary to encumber the record of the court with.

Q. 18. You may state whether there was issued to you from the trust Co. to whom the bonds and mortgages were issued bonds, first-

mortgaged bonds and income bonds, in pursuance of the contract made with the company when you sold the road to it.

Counsel for the complainants objects to the question as immaterial.

A. The trust Co. delivered the bonds to the railroad company and the railroad Co. delivered them to me.

Q. 19. And then what did you do—did you deliver to Preston and the others, on their asking, these bonds in pursuance of the contract?

A. Yes, sir.

Q. 20. Did you take a receipt therefor?

A. Yes, sir.

Q. 21. Can you produce it?

A. Yes, sir.

Judge JORDAN: A copy of the receipt is attached to Exhibit A, complainants' testimony.

Q. 22. You may state whether prior to making the contract, Exhibit A, you know whether any of the parties to that contract, Preston, McHenry, or the others, had seen this road; whether
142 you know it as a fact or from a conversation with them or either of them.

A. Yes, sir; they had seen the road.

Q. 23. State what you know about that.

Counsel for the complainants objects to the question as immaterial.

A. After I made the proposition to them they went up and saw the road. Preston and McHenry came back and said they had seen the road and would enter into that contract.

By Mr. RIDDLE:

Q. 24. When was that?

A. Before the contract was entered into—after the proposition was made.

By Judge JORDAN:

Q. 25. State whether after the road was completed you know of either of them or any agent of theirs having gone up to examine the road or to see whether it was constructed according to the contract before the receipt of the bonds was given.

A. Yes, sir; Mr. Preston returned from the road the day before he gave his receipt in full of all demands.

Counsel for the complainants objects to the question and answer.

Q. 26. How do you know?

A. He told me so.

Q. 27. You may state whether the bonds of all these parties contracting were delivered to Mr. Preston for them.

Mr. RIDDLE: I object. The receipts are in evidence.

Judge JORDAN: Were delivered to Mr. Preston in pursuance of that receipt.

143 A. Yes, sir; all delivered to Mr. Preston.

Q. 28. After he had been up and seen the road?

A. Yes, sir.

Q. 29. As he stated?

A. Yes, sir.

Q. 30. Was there any of the other contracting parties here at the time?

A. I think Mr. McHenry was here.

Q. 31. Was he present?

A. Yes, sir. Well, I think I will modify that. I don't think he was present all the time. I think he was over to Chatfield and Woods a part of the time, but he was back in time to sign the receipt.

Q. 32. Do you know who all signed the receipt?

A. Mr. Preston signed it, Mr. McHenry signed it, and Joe Wilshire signed it. All of them signed it.

Q. 33. They signed it personally?

A. Yes, sir.

Q. 34. Did they sign it after or before the bonds were delivered?

A. After the bonds were delivered.

Q. 35. Part of the transaction, was it?

A. Why, certainly.

Q. 36. State substantially all that transpired at the time of making the contract, Exhibit A, and with reference thereto.

144 Counsel for the complainants objects to the question on the ground that contract is in evidence and shows what was done.

A. These parties—Preston, McHenry, and Wilshire—came to my office and claimed, after absorbing some four hundred thousand dollars in cash—a margin for wheat in Chicago—that I owned them a balance of two hundred and odd thousand dollars, which I disputed; but, in order to effect a compromise, I told them I had a narrow-gauge railroad up in the country that I would incorporate, issue bonds at the rate of twenty thousand dollars per mile—income bonds at the rate of twenty thousand dollars per mile. They said they would go up on the road.

By Mr. RIDDLE:

Q. 37. That is, Preston, McHenry, and Wilshire?

A. Wilshire did not say he would go up.

By Mr. RIDDLE:

Q. 38. These are the three parties that have the contract?

A. Yes, sir; but Preston and McHenry said they would go up.

By Mr. RIDDLE:

Q. 39. These were the three men to whom you said you owed margins?

A. Yes, sir. They said they would go up and make an examination and report upon the proposition later. They came back and said if I would make it a standard gauge and issue bonds and connect it at both ends—at one end with the Little Miami and at the other with the Ohio Southern—they might make a trade. I
145 proposed to do so, and to give them par in first-mortgage bonds at the rate of twenty thousand dollars per mile and par in stock of the road. They said they would accept firsts and seconds, but didn't want the stock, as there might be some liability on the running of the road. I proposed then if they would not take the stock—it was a release—if they would not take the stock, to only give them fifty per cent. of the income bonds with par of the first mortgage, which they accepted. Before they accepted they wanted to know how we could organize. It was then and there agreed that I should construct the road according to the contract and take pay from the company, all the first mortgage, all the income bonds, and all the stock or stock subscriptions, if it required any to consum-ate it for the property.

Counsel for the complainants move to strike out the answer as wholly immaterial and irrelevant.

Q. 40. State particularly what was said about the stock, if anything.

Counsel for the complainants objects to the question.

A. It was agreed that I was to have the entire capital stock for the building of the road.

Counsel for the complainants moves to strike out the answer.

Q. 41. Who were present or participated in that conversation which led to that agreement—I mean of the contracting
146 parties, of the persons whose names are attached to that contract?

A. Preston, McHenry, and Wilshire, and other people. Those were all the contracting parties, but there were other people there.

Q. 42. Howard Eckert & Co. signed it. Were they there?

A. Wilshire is the company of Howard Eckert & Co.

Q. 44. At the time the contract was made with the corporation by which you made that proposition and it was accepted, to wit, about the 10th or 13th of Dec., 1881, what opportunities — of knowing the value of the road?

A. I sold the original builders of the narrow-gauge road part of the iron on it and had dealings with them.

Counsel for the complainants moves to strike out the answer as irresponsive.

Q. 44. The question I put was what opportunity you had for knowing the value of the property? You mentioned one circum-

stance. I don't know whether you know of any others or not. You sold them the iron and knew some parts of the road. What other circumstances were there?

A. I was thoroughly familiar with railroad building and have supplied iron for many years.

Q. 45. Go on.

A. I went to Washington Court-House to see these very people, and I sold them the rails for part of this road, and therefore became familiar with about what money they spent on the road.

147 Q. 46. Proceed, Mr. Harper, and state all your opportunities—any further opportunities. Have you any further answer to make?

A. Is that in reference to the value of the road?

Mr. RIDDLE: I object to that style of conversation between the witness and counsel. Let him answer the question.

A. Before I bought the road as twenty miles of narrow gauge I understood from the builders that they had spent in the neighborhood of two hundred thousand dollars in addition to the original cost. The road runs through a beautiful country—an east-and-west road—and when it is extended east to Columbus and west to Cincinnati it will make a road shorter than the Little Miami. It will make a first-class property.

Counsel for the complainants moves to strike out all the answer.

Q. 47. You can state whether you are familiar with the country through which it passes.

A. Yes, sir; it runs through a beautiful country.

Q. 48. And the termini of the road connecting at each end?

A. Yes, sir; I am acquainted with it. It connects on the east with the Ohio Southern and on the west with the Little Miami.

Q. 49. Are you familiar with the roads tributary to it?

A. Yes, sir.

Q. 50. On the east and west ends?

148 A. The road, extended from the present terminus to Columbus, will make it run through as beautiful country as there is in Ohio.

Counsel for the complainants move to strike out the answer.

Q. 51. You only know what it cost them from a conversation you had with the officers of the road—what it cost them?

A. Yes, sir; besides my knowledge of supplying them with material.

Q. 52. Now, taking into consideration the proposed improvements of widening and extending proposed and contemplated by your proposition of Dec. 13, 1881, your knowledge of the road, the country through which it passes, what, in your judgment, was the value at that time and now is of the road, if constructed according to the terms of that contract—of course, I mean by the road its right of way, franchises, and the entire superstructure.

Mr. RIDDLE: I object to that because it calls for the opinion of an

expert, and the witness has not yet shown that he is capable of judging of the value of railroad property.

The WITNESS: Do you mean with the east and west connections to Cincinnati?

Mr. RIDDLE: I object to that sort of inquiry.

Mr. JORDAN: I will take care of that.

The WITNESS: With the east and west connections, the way
149 it was contemplated, the road would be a part of an east-and-west through trunk line; it would be worth the securities on the road, but without the connections it would not be worth—I didn't get for building the road within one hundred thousand dollars in cash as much as I ought to have had—that is, after the road was built without these connections the securities I got for building the road are not worth as much now within a hundred thousand dollars as the property cost me.

Mr. RIDDLE: I move to strike out the answer as irresponsive to the question and as immaterial, anyhow.

Q. 53. State what, in your judgment, was the value in money at that time and under the circumstances indicated in the previous question.

Counsel for the complainants make the same objection as before.

A. I only know that from the cost of the building.

Q. 54. The question is what, in your judgment, in view of all these considerations, was the value in money of the road at that time, with its franchises, the superstructure, and the roadway, at the time you made the contract in June of the contemplated improvement under the contract of Dec. 13? What, in your judgment, was the value in money at that time, taking everything into consideration?

Counsel for the complainants object to the question on the same ground.

150 Do you mean the contemplated extension east and west?

Q. 55. Yes, sir; everything that was in prospect with the probabilities—all the probabilities and expectations.

A. I answered that in the previous question.

Q. 56. No; but I want to know what that amount in money was.

A. The road would cost in cash between three and four hundred thousand dollars from first to last.

Mr. RIDDLE: I move to strike out the question and answer both.

Q. 57. You may now state what its value in your judgment was.

Counsel for the complainants objects to the question.

A. I think it was worth all of that.

Counsel for the complainants move to strike out the answer.

The witness adds: At that time.

Q. 58. You may state what this road cost you when you purchased it.

Counsel for the complainants object to the question.

A. I purchased it some time before I made the contract.
Q. 59. About how long before?
A. Perhaps six months.
Q. 60. Before which contract?
A. The contract of October 12.
Q. 16. What did it cost you?

151 Counsel for the complainants objects to the question.

A. The narrow gauge cost me sixty-five thousand dollars, cash and interest.

Counsel for the complainants moves to strike out the answer.

Q. 62. In view of the reason of the year which called for the completion of that road from within four months from October 13, what was a reasonable expectation as to the cost of the construction of the road in accordance with the terms of the contract?

Counsel for the complainants objects to the question.

A. It compelled me to construct the road in the winter—in the dead of winter, when it was almost impossible to do grading, excavating, and building of railroads, and it was almost impossible to get a reasonable idea of how much money it would cost. It was a very risky contract on my part.
Q. 63. How was it on Dec. 13, when you made the contract with the railroad company?

Counsel for the complainants objects to the question.

A. It was just as difficult. It was impossible to tell what the railroad would cost to construct it in winter.
Q. 64. Then you have had to take all these chances?
A. I had to take a fearful risk.
Q. 65. What risks do you refer to?

152 Counsel for the complainants objects to the question.

A. Of my being able to construct the road in dead winter within such a short time.

Counsel for the complainants moves to strike out both question and answer.

Q. 66. Now you may state what it actually did cost you, the construction—that is, the extending and widening in pursuance of the contract.

Counsel for the complainants objects to the question.

A. The twenty miles that I bought at about scrap-iron price and the money that I spent afterwards, as near as I can recollect, cost about one hundred and eighty-five thousand dollars in cash.

Counsel for the complainants moves to strike out the answer.

Q. 67. How soon after making the contract with Preston *et al.*, Oct. 12, was it that you commenced your movements or proceed-

ings to organize the company and to carry out the terms of that contract?

Counsel for the complainants objects to the question.

A. It was almost immediately after.

Q. 68. With whom did you confer as co-operators with a view to effect the organization?

Counsel for the complainants objects to the question.

153 A. I conferred with J. E. Gimperling.

Q. 69. Give a list of all the men now that you conferred with on that subject to co-operate with you.

Counsel for the complainants renews his objection.

A. George Clymer, John L. Pfau, William H. Harper, W. C. Herron, E. Snowden, D. P. Hyatt, and Perry & Jenny.

Q. 70. To aid you in your recollectian I refer you to Exhibit B of the complainants' testimony.

A. Wm. Woods, Alexander Swift, Louis Seasongood, and B. S. Cunningham.

Q. 71. I will ask you, to further aid your recollection, whether it extends to all the persons who subsequently became directors of the road.

A. Yes, sir.

Q. 72. State whether you had conversation with these gentlemen, prior to the getting up of the paper which was an application to the secretary of state for the certificate of incorporation as shown in Exhibit B of complainants' testimony, with reference to the organization and preparatory thereto.

Counsel for the complainants object to the question.

A. With some of them; I don't think with all of them.

Q. 73. You may state whether conversations of that kind, conversations with reference to the organization of the road pursuant to the carrying out of the arrangement you had with these gentlemen by the contract of Oct. 12, whether these conversations were had

154 with the persons who became the corporators of the road.

Counsel for the complainants object to the question.

Q. 74. You know what I mean by corporators?

A. Yes, sir.

Q. 75. Did these conversations take place with these men who became the incorporators, as you see in this book?

Counsel for complainants renews his objection.

A. Yes, sir.

Q. 76. Now state whether or not you had a conversation with them with reference to the subject-matter at the time that they subscribed to this certificate and as part of the execution of it.

Counsel for the complainants objects to the question.

A. Yes, sir.

Q. 77. You may state what the agreement, if any, was between you and these incorporators at the time that the certificate was prepared and with reference thereto as to the organization of this company and the issuing of stock and bonds and the construction of the road; how it was to be paid. State it fully at that time.

Counsel for the complainants objects to the question.

A. My talk with some of these incorporators was not very general, because it was understood that they were not to have
155 any interest in the road.

Q. 78. Well, with those that you did confer with on this subject; state it fully.

Counsel for the complainants renews his objection.

A. I was to build the road for the securities of the road.

Q. 79. What do you mean by the securities of the road?

A. I mean all the capital-stock subscriptions, if it required any to consum-ate the organization, and all the bonds to be issued according to that contract.

Q. 80. I will ask you whether the terms of the contract with Preston *et al.*, of Oct. 12, 1881, were the subject of conversation, and whether they knew what contract was.

Counsel for the complainants object to the question.

A. Yes, sir.

Q. 81. Those with whom you talked?

Counsel for the complainants makes the same objection.

A. Yes, sir.

Q. 82. Where did you meet in having these conversations, any one place?

A. No, sir; in no one place.

Counsel for the complainants move to strike out both question and answer.

156 Q. 83. Do you recollect the circumstances under which you signed Exhibit B?

Counsel for the complainants object to the question.

Q. 84. State what took place at the time and what your conversations were with reference thereto with the other incorporators.

Counsel for the complainants object to the question.

Q. 85. State what your recollection is as to it and the circumstances and what your conversation were with these persons.

Counsel for the complainants renews his objections.

A. I don't think there were many incorporators present.

Q. 86. Those that were present?

A. And the railroad Co. was present and the directors.

Q. 87. Those persons who subsequently became directors?

A. Yes, sir—that is, who the contract is made with.

Q. 88. Prior to that time was there arrangement made or any conversation or any arrangement or understanding between you and those who subsequently became directors who were to be the directors of this road?

A. Yes, sir.

Counsel for the complainants moves to strike out the last question and answer.

157 Q. 89. Did the conversation or understanding take place with the persons who subsequently became directors of the road prior to its organization?

Counsel for the complainants objects to the question.

A. Yes, sir; I had talks with the most of them and agreements with them.

Q. 90. Now, what was the agreement—what was the conversation and agreement between them as to what was to be done?

Counsel for the complainants objects to the question.

A. The agreement was that they were to assist in the organization or be promoters in this enterprise for the purpose of my carrying out my contract of October 12, and that I was to have the entire stock or stock subscriptions, if it required any to the organization, and all the bonds to be issued in accordance with the terms of that contract of October 12, in consideration of constructing the road according to that contract.

Q. 91. Now, state whether you had conversations along from time to time prior and subsequent and up to the occasion when you met to organize a board of directors.

Counsel for the complainants objects to the question.

A. Yes, sir.

158 Q. 92. Do you recollect at the time that you subscribed to the capital stock the amount specified in Exhibit Complainants' Testimony whether there was anything at that time said in regard to the circumstances of signing the paper at that time?

Counsel for the complainants objects to the question.

A. Yes, sir.

Q. 93. What was it?

Counsel for the complainants objects to the question.

A. Mr. Jenny advised that ten per cent. of the capital stock would have to be subscribed in order to consum-ate the organization. I proposed to subscribe the stock and pay for it, according to my original understanding, by building the road.

Q. 94. What understanding?

A. The understanding that I was to build the road, construct the road, for all the stock and all the subscriptions, with all the directors and parties interested—all the promoters.

Q. 95. You say that that conversation occurred at the time you

made your subscription—at the time you signed your name in that book, Exhibit B of the Complainants' Testimony?

A. Yes, sir. There was no one to pay any subscription or money at all.

Counsel for the complainants moves to strike out the answer.

Q. 96. Was that agreed?

159 A. It was agreed before and after, at that time, that there was not to be one penny paid in as capital stock in cash.

Q. 97. What was that agreement?

A. The agreement was with all the directors, before they were elected directors and after they were elected directors, and all the stockholders.

Q. 98. After having had this conversation now with the stockholders and contemplated directors and some of the incorporators, as you have stated, you may state at the time you made your written proposition to them what occurred on the subject at that meeting. It appears that the election of directors, the election of officers, the organization of the board, and the *por*position and acceptance occurred on the 13th. What was said there and then between you and the board after its organization in the making of your proposition?

Counsel for the complainants objects to the question.

A. My proposition was in accordance with this agreement of October 12 and consum-ating that. That was all that was talked about.

Counsel for the complainants objects to the answer and moves to strike it out.

Q. 99. I observe in your proposition you say you are ready to take six hundred thousand dollars in stock, including the subscriptions already made. What was said upon that subject?

160 Counsel for the complainants object to the question.

A. You mean when the stock was subscribed.

Q. 100. I call your attention to the language of your proposition, to wit: "Six hundred thousand dollars of the capital stock, including the subscriptions already subscribed." What was said about that?

Counsel for the complainants objects to the question.

A. That was in pursuance of the previous agreement before any stock was subscribed.

Q. 101. Before there was any subscription at all?

A. Yes, sir; I mean my proposition of Dec. 13 was in pursuance of it.

Q. 102. Is that all?

Counsel for the complainants moves to strike out the answer.

At this point a recess was taken for dinner.

On the reassembling in the afternoon Mr. ISAAC M. JORDAN continued the examination of the witness as follows:

Q. 103. Who owned the Cincinnati, Washington and Columbus railroad at the time you made the agreement of October, 1881? Was it a narrow-gauge or a broad-gauge road at that time? How long was it and what were its termini?

Counsel for the complainants objects to the question.

161 A. I owned it. It was about 20 miles long; a narrow-gauge. The termini were Wilmington on the east and running within about 2 miles of Wilmington on the west.

Q. 104. Before you entered into the agreement to widen and extend the road, what, if anything, did McHenry or any of the other persons whose names are attached to the agreement of October 12 say to you in regard to the character of the country through which that road ran?

Counsel for the complainants objects to the question.

A. Preston and McHenry both said it was a beautiful country after they returned, and that its connections at each end in view of their being completed further it would be a first-class road.

Q. 105. In widening and extending said road did you or not use the old road, its roadway, road-bed, and appurtenances?

Counsel for the complainants objects to the question.

A. Yes, sir; so far as it went.

Q. 106. State what reason was given or talked of between you and the parties to the contract of October 12, 1881, or any of them, by which the name of this road was changed from the Columbus, Washington and Cincinnati railroad, or why the name of the Cincinnati, Columbus and Hocking Valley name was adopted.

Counsel objects (counsel for complainants) to the question.

A. The matter was all talked over in connection——

Q. 107. Between whom?

162 A. Preston & McHenry, Wilshire & myself, in reference to constructing the road beyond where it was, making it run toward Columbus and the Hocking Valley coal-fields?

Q. —. Now, you talk about that. Now, why was the new name adopted and the old name abandoned?

Counsel for compl'ts objects to the question.

A. It was on account of giving it a good name in view of the building of more road ending at Cincinnati, Columbus, and Hocking valley.

Q. 109. Why was the Hocking Valley part put on?

A. There was a road surveyed from Mt. Sterling down to the Hocking valley that this would touch.

Q. 110. Now, what other reason was there for getting up an organization?

Counsel for compl't- objects to the question.

A. For the purpose of carrying out the contract of Oct. 12.

Q. 111. What was said, if anything, in regard to yourself not owning an incorporation?

Counsel for compl't- objects to the question.

A. They wanted a new name. The old road was a narrow-gauge road. It was known as a narrow-gauge road. They wanted a standard-gauge road, and wanted a new name all through.

Q. 112. What was your relation to the old road? Were you a company or what was your status at that time?

Counsel for the compl't- objects to the question.

A. I owned it individually—the road. I didn't own the company.

Q. 113. Was that spoken of at the time you were making this contract with these persons?

Counsel for the complainants objects to the question.

A. Yes, sir; it was all considered.

163 Q. 114. That was spoken of in connection with the fact that you were getting up a new organization?

Counsel for the compl't- objects to the question.

A. Yes, sir.

Q. 115. If I understand your answer to my question it is, then, that inasmuch as you owned this road as an individual and also owned its franchises, but was not yourself an incorporation, it was thought best at that time to get up a corporation?

A. Yes, sir.

Q. 116. And you may state whether that matter that I have just been speaking of in the last two questions was talked over between you and these persons at that time.

Counsel for the complainants objects to the question.

A. It was all talked over.

By Mr. RIDDLE:

Q. 117. It was all before the contract was made?

A. Yes, sir.

By Mr. JORDAN:

Q. 118. You may state whether from the time that you made that contract of October 12 down to Dec. 13, which was the date of your proposition to the road to construct it under your proposition to them, whether Mr. Preston or Mr. McHenry or the other complainants in this proceeding were not in the habit of coming to your place of business.

164 A. Yes, sir; they were.

Q. 119. You may state whether that was so—seldom or frequently.

A. I saw Mr. Wilshire, of Howard Eckert & Co., frequently. I

saw Mr. Preston quite frequently. I saw Mr. Henry I don't know how *how* many times; I saw him in the meantime.

Q. 120. Going back one moment, where was this contract of October 12 signed?

A. At my office.

Q. 121. At your place of business?

A. Yes, sir.

Q. 122. I see that it was drawn by Alaxander Ferguson.

—. ——

Q. 123. Were you up at his office?

A. No, sir.

Q. 124. Who brought it, after he drew it, to you?

A. Either Preston or Mr. McHenry, or both of them, brought it in pencil and my young man, after we agreed on the details—Mr. Gahr—drew it up.

Q. 125. Where was your place of business at that time?

A. # 26 West Third St.

Q. 126. Is that the same place of business where you have said these parties—Preston, McHenry, and the other parties—came down to see you from time to time between the dates of October 12 and Dec. 13?

A. Yes, sir.

Q. 127. Now, after the date of December 12, which is the date of your proposition to build the road for the company, you
165 may state whether —, and, if so, which one, was at your place of business and how often.

A. Wilshire was there several times and Preston. I don't remember whether McHenry was there or not.

Q. 128. I will ask you when they were there whether they talked with you or knew who your associates were in the carrying on of this railroad enterprise—who the directors were.

A. Yes, sir; they knew all about it; they were very particular to find out.

Q. 129. Did you inform them? Did they know?

A. Yes, sir; they knew all about it.

Q. 130. I will ask you whether they made many inquiries with regard to it after the date of your contract for the construction of the road.

A. They were on the road several times—that is, Mr. Preston was and I think McHenry was.

Q. 131. And in regard to being at your place of business and inquiring about the road?

A. Mr. Preston came to my office and got full particulars and then went to Dayton to see what the prospect of extending the road to the Hocking valley was or selling his securities before he had received them.

Counsel for compl't- moves to strike out the last 3 or 4 questions and answers.

Q. 132. I want to ask you one question in regard to the bonds. You may state whether the offer of the 1st-mortgage bonds, as de-

livered to McHenry and the others parties to the contract of
166 Oct. 12, was ever shown or made known to them prior to the time that the bonds were delivered to them as executed.

A. Yes, sir; they saw copies of the bonds. I furnished them a copy from the engraving company unexecuted.

Q. 133. How long before the signing of the bonds did they see them?

A. I think they furnished me a copy in January.

Q. 134. Did they take those bonds home with them, away from Cincinnati?

A. Yes, sir.

Q. 135. They were, then, familiar with the bonds before you delivered them?

A. Yes, sir; they were familiar with the bonds, and they gave satisfaction.

Q. 136. Had they read and examined the bonds?

A. Yes, sir; thoroughly.

Counsel for the compl'ts moves to strike out the last 3 questions and answers.

Q. 137. Now, speaking of the reorganization of the old road with the change of name, you may state whether anything was said, and, if so, what, by either of the parties to that contract or yourself or anybody else at that time in their hearing in regard to its being necessary to have a new company organization or reorganization of the old because of the fact that you yourself was only the owner of the road and was not yourself having at that time any incorporated company to run the road. What was said on that subject?

167 Counsel for the compls'ts object to the question.

A. It was all talked over to know how we could do or make the organization so as to comply with the contract. It was talked over that I owned the road personally; therefore I was not a railroad Co., but they wanted a new name, anyway; they wanted a new name that would sound big.

Q. 138. I know that, but I want to know what was said on the subject of your being an individual, if anything, and your not being a corporation and not having the right yourself to run the road.

Counsel for the complainants objects to the question because the counsel for the defendants instructs the witness what to say.

Mr. JORDAN: These objections are foreign to Ohio, but may belong to Chicago.

The WITNESS: All these matters were talked over fully.

Judge JORDAN: What was the answer to that question?

The EXAMINER: He made no answer to the question.

Judge JORDAN: Pay no attention to what the gentleman from Chicago says.

Mr. RIDDLE: Put all that down; it makes good reading.

Judge JORDAN: I want you to answer the question. The objec-

tion as made by Mr. Riddle, of Chicago, is an objection of law with which you have nothing to do. So answer the question irrespective of the objection.

168 A. The matter was talked over fully that the road being owned by me individually we would have to organize a company in some way in order to get these bonds properly issued.

Counsel for the complainants moves to strike out the question and answer.

Cross-examination by Mr. RIDDLE:

X Q. 139. You say, Mr. Harper, that this was all prior to the contract of Oct. 12, 1881—this conversation in regard to the name and the proposed organization of the corporation in settlement of the matters in dispute?

A. Yes, sir; it was all prior to that date?

X Q. 140. Are you a railroad man, Mr. Harper?

A. I have furnished materials for railroads ever since I have been in the iron business—rails and fastenings.

X Q. 141. Did you ever build a railroad?

A. Not until I built this one. I furnished materials to build roads and give them credit in doing it.

X Q. 142. I wish you would answer my questions. Are you a railroad engineer?

A. No, sir; I am not an engineer.

X Q. 143. Do you know anything about the practical construction and building of railroads?

169 A. Yes, sir.

X Q. 144. In what way?

A. From the specifications furnished by other parties and the cost of constructing roads and furnishing iron. I know how much iron is required for a mile of road, cross-ties, spikes, &c.

X Q. 145. Are you an expert in the matter of building and operating a railroad?

A. No, sir; I am a manufacturer of railroad iron. Railroad manufacturers are pretty familiar with those things.

X Q. 146. How long did you say this narrow-gauge road was that you owned prior to the execution of the contract of October 12, 1881?

A. It was about 20 miles.

X Q. 147. What condition was that twenty miles of road in at that time?

A. I don't know. I never saw the road up to the time that the contract was made. Preston and McHenry saw it; and, from what I got from them, I should judge it was in a pretty good condition.

X Q. 148. You never saw the road yourself?

A. No, sir.

X Q. 149. Do you know what it was worth?

A. Only from what I gave for it. I gave sixty-five thousand dollars for it in cash.

X Q. 150. What was the kind of iron on the road at that time?

A. First-class iron.

170 X Q. 151. What was the quality and weight of the iron at that time?

A. It was first class. The weight was 35 pounds to the yard that I furnished.

X Q. 152. What was the kind of iron, weight of iron, and its condition prior to the contract of Oct. 12, 1881?

A. It was all in good condition. 35 pounds to the yard is what I furnished.

By Mr. JORDAN:

X Q. 153. Did you state how many miles you made?

A. About 15.

By Mr. RIDDLE:

X Q. 154. Do you mean that you furnished the iron that was on then?

A. Yes, sir.

X Q. 155. How long had it been upon the road at the date of that contract?

A. 2 or 3 years.

X Q. 156. What was the iron on the road at that time worth?

A. The iron on the road at that time could not have — replaced at less than sixty dollars.

X Q. 157. Just answer the questions asked. What was that iron at that time worth in money, if you know?

A. The rails were new in 1881, and new rails were worth $60 per ton.

171 X Q. 159. How many tuns were there on the road?

A. I guess about 60 tuns to the mile—twelve hundred tuns, about.

X Q. 160. Do you know how many tuns of 35-pounds iron it would require to lay a mile of narrow-gauge road?

A. Yes, sir.

X Q. 161. Well, how many?

A. It would take about 60, splices, spikes, and rails.

X Q. 162. I mean as to rails.

A. I think it is 57, if I am correct; about 57.

By Mr. JORDAN:

X Q. 163. 57 what?

A. Tuns to the mile.

By Mr. RIDDLE:

X Q. 164. And that kind of 35-pound rails was worth $65 a tun, was it?

A. Yes, sir; in 1881.

X Q. 165. 35-pound iron?

A. Yes, sir.

X Q. 166. That would take twelve hundred tuns for 20 miles of road?

A. Yes, sir.

X Q. 167. How much would that amount to in the aggregate?

A. About seventy-two thousand dollars.

X Q. 168. How many miles of new road did you construct?

A. I don't know the exact distance, but I constructed a new road from Allentown to Jeffersonville and from the end this side to the Little Miami, near Corwin.

X Q. 169. Do you pretend to say you don't know how many miles of new road you constructed?

172 A. Yes, sir; I don't remember. I think they call it 28 miles—length of road and switches.

X Q. 170. Did you ever know the number of miles of new road you built there?

A. I only furnished the materials and paid the bills.

X Q. 171. How far was it from Allentown to Jeffersonville?

A. That I could not tell you. I think between 4 and 5 miles.

X Q. 172. What points did you say was the western terminus of the old narrow-gauge road?

A. I don't know where it was. I never saw it at that time. I have been over the road since it was constructed, but not before. I understood, however, between 3 and 4 miles from the Little Miami.

X Q. 167. How much did you pay for building the six or seven miles of road to complete it from the old termini to its——

A. I could not tell you.

X Q. 168. Did you not say that you paid one hundred and eighty-five thousand dollars for that road?

A. No, sir.

X Q. 169. And for widening the gauge of the old road?

A. That is a different thing. The old road had to be widened, of course, and changed in some places. The bridges had to be changed and new cross-ties put in. My outlay, including the cost of the road, as near as I can figure it, about one hundred and eighty-five thousand dollars—absolute cash.

173 X Q. 170. What did that include?

A. Everything.

X Q. 171. That included the widening of the gauge of the old narrow-gauge track?

A. Yes, sir; changing the bridges, trestles, cross-ties, and new rails.

X Q. 172. How many bridges did you change?

A. All on the road.

X Q. 173. How many are on the road?

A. That I could not tell you. I never was on the road until after it was done.

X Q. 174. What did you do with the bridges?

A. All had to be widened, very near.

X Q. 175. What did you do with the ties on the old narrow-gauge road?

A. Used some of them.

X Q. 176. How many new rails did you put down on the part of the narrow-gauge road which made part of the whole?

A. That I could not tell you.

X Q. 177. What kind of iron did you put on the number of miles of the road that you extended?

A. 50 pounds to the yard.

X Q. 178. What quality of iron was that?

A. First-class.

X Q. 179. Was it new or old iron?

A. New.

X Q. 180. What was that iron worth?

174 A. That was worth on the track about $60 per ton.

X Q. 181. Was 50 pounds of iron worth $60?

A. I paid $54 here and it required freight and laying down.

X Q. 182. How many tons did you buy?

A. That I could not tell you.

X Q. —. Do you know?

A. No.

X Q. 184. Have you any means of knowing?

A. I could only find out by the parties I bought of.

X Q. 186. You paid $54 a ton for it here?

A. Yes, sir.

X Q. 187. Don't you know how much money you paid?

A. No, sir; I don't.

X Q. 188. Have you any means of telling?

A. No.

X Q. 189. Do you mean to say that you paid out large amounts of money, $54 per *tun*, for iron without keeping any record of the transaction in your business?

A. I never kept any personal account.

X Q. 190. Do you keep any books of account?

A. No, sir; not personal accounts.

X Q. 191. Did you keep books of your firm?

A. We have books, but I didn't keep personal account.

X Q. 192. In what way was the iron paid for?

A. In cash.

X Q. 193. Any credit?

A. It might have been transferred. It was all bought.

175 It might have been transferred. It was all bought from Swift's iron and steel works.

X Q. 194. Are you an owner of Swift's iron and steel works?

A. No, sir; I am a stockholder.

X Q. 195. Are you a director?

A. Yes, sir.

X Q. 196. Are you an officer of that company?

A. Yes, sir; I am president of it.

X Q. 197. And you bought the iron from your company?

A. Yes, sir.

X Q. 198. Was not the price you were to pay to be charged to you on the books of that company?

A. Yes, sir.

X Q. 199. Was that done?

A. Why, certainly; to my account.

X Q. 200. Then you could tell?
A. The Swifts iron and steel works could tell.
X Q. 201. You have access to these books, have you not?
A. Yes, sir.
X Q. 202. Will you produce them here?
A. No, sir. I will give you a statement if you want it.
X Q. 203. Will you produce the books on this examination?
A. No, sir. I have no right to bring their books into court. It is a personal matter.

176 By Mr. JORDAN:

X Q. 204. Will you furnish the complainants with a copy of the account?
A. I will have the company furnish an account. (After a pause:) It is a damned piece of impudence to ask me to bring books belonging to other people in courts.

By Mr. RIDDLE:

X Q. 205. Do you know what you paid for widening the gauge of the old narrow-gauge road?
A. I only know that I am charged in the account about one hundred and eighty-five thousand dollars in cash for everything.
X Q. 206. I know you stated that, but answer the question.
A. I cannot answer that way, but in any way, shape, or form I can, because I did not divide it.
X Q. 207. Do you know who you paid this money to—the one hundred and eighty-five thousand dollars?
A. No, I don't; the most of it went through Mr. Gimperling's hands.
X Q. 208. Did you pay it to Mr. Gimperling?
A. I paid his drafts.
X Q. 209. Have you those drafts?
A. I don't know.
X Q. 210. Have you any record of them?
A. I didn't keep any personal account.
X Q. 211. In what way did you pay the drafts, in currency or by checks?
A. That I could not tell.
177 X Q. 212. How large a draft did he ever draw on you at one time in connection with the construction of the road?
A. I could not tell you.
X Q. 213. Have you any vouchers for the payment of any part of that money of any kind—checks, drafts, bills, receipts, or anything else?
A. I don't think I ever had any; I paid money through Gimperling.
X Q. 214. Then you pretend to tell us that you paid out one hundred and eighty-five thousand dollars for work done on that road without keeping a record of it?
A. I do.

Counsel for the defendants objects to the last question, because it assumes that the witness says that he paid one hundred and eighty-five thousand dollars for work done on the road, when the witness has repeatedly stated that sixty-five thousand dollars was what he paid as the price of the road to the parties from whom he bought it.

Mr. RIDDLE: I understood Mr. Harper to say this morning—to say that he paid sixty-five thousand dollars for the old narrow gauge, the 20 miles, and that he paid one hundred and eighty-five thousand dollars to widen the gauge and extend it to Jeffersonville on the end and Claysville Junction on the other.

The WITNESS: No; that was the entire cost.

178 X Q. 215. Now, what do you say about that?

A. I say that the entire cost of the property, widened and extended, including the old road, was about one hundred and eighty-five thousand dollars cash.

X Q. 216. Then you mean to say that you paid out one hundred and twenty-five thousand dollars in money to make the extension and widen the gauge and make the nececsary incidental repairs?

A. Well, I mean to say I am out that much—altogether about one hundred and eighty-five thousand dollars.

X Q. 217. You are making this statement now: If you paid one hundred and eighty-five thousand dollars altogether and sixty-five thousand dollars of that was paid for the twenty miles of the old narrow-gauge road, how much did you pay for making the extensions, widening the track, repairing bridges, etc.?

A. I am out one hundred and eighty-five thousand dollars; that is all about it. I don't know how I divided it.

X Q. 218. Can you subtract?

A. I guess you can.

Mr. RIDDLE: Yes; but I am not on the stand.

The WITNESS: You have four hundred thousand dollars of my money.

A. I have not got a dollar of your money.

The WITNESS: Some of those bed-bugs have—the Chicago bed-bugs have.

X Q. 219. Taking sixty-five thousand dollars from one
179 hundred and eighty-five thousand dollars would leave one hundred and twenty thousand dollars, would it not?

A. I believe you are figuring that.

X Q. 220. Well, is that correct?

Mr. JORDAN: Oh, yes.

The WITNESS: Yes, sir; that is right.

X Q. —. Now, one hundred and twenty thousand dollars must have gone for repairs of the old road, widening its track and making its extensions, must it not?

A. It must have gone into the construction in some way.

X Q. 221. Well, did you pay it out?

A. Well, I am out of it. I think if I had not drawn the line it would have been going yet.

X Q. 222. Did not that one hundred and eighty-five thousand dollars go into the subsequent operations of the road?

A. I have every reason to believe that it did.

X Q. 223. Well, do you know that it did?

A. I think my agents were honest. I think it did.

X Q. 225. Is that your answer?

A. Yes, sir.

X Q. You won't say positively that that amount of money did go into the construction of the road?

Mr. JORDAN: He has answered that question.

Mr. RIDDLE: The witness quibbles all the way through.

X Q. 227. Now, do you pretend to say that this one hundred and twenty thousand dollars did not go into the road?

180 A. I think it went into the road.

X Q. 228. Do you know it?

A. I am out that money. That is all I know about it.

X Q. 229. Did it go into the extension of the road, &c.?

A. There might have been some of it used for salary and labor connected with doing it.

X Q. 230. How much was used in that way?

A. There might have been some of it used in printing these steel-engraved bonds. These fellows wanted an expense of that kind. I think they cost forty-five hundred dollars alone.

X Q. 231. Have you no vouchers for the expenditure of that amount of money?

A. I may have among my old papers some of Gimperling's drafts.

X Q. 232. Where are there?

A. I didn't keep any.

X Q. 234. How did you find out how much money you had or what your bills payable were?

A. Well, I kept all my finances in such shape that I could tell pretty close.

X Q. 235. Carried it in your head, did you?

A. Yes, sir.

X Q. 236. You did, did you?

A. Yes, sir; personally I didn't keep any books at all.

X Q. 237. Have you any other business besides this of the Swifts iron and steel works?

181 A. Yes, sir; E. L. Harper & Co.

X Q. 238. Who else is interested in it besides you?

Counsel for the def't objects to the question.

A. I have partners.

X Q. 239. Who?

A. My brother and Geo. E. Clymer.

X Q. 240. Does your firm keep any book account?

A. Yes, sir; a thorough set.

X Q. 241. Would the books of that firm show the payment of any part of this money?

A. They never paid a dollar for me.

X Q. 242. Then you have no account outside of the firm of E. L. Harper & Co.?

A. I don't keep any personal accounts. I have told you that a great many times.

X Q. 243. I know that, but I want you to answer my question. You kept no books of account?

A. No personal books of account.

X Q. 244. You kept no books of account other than such as are kept by the firm of E. L. Harper & Co. and by the Swifts Iron and Steel Co.?

A. Well, I didn't keep those. Those are the firm books.

X Q. 245. And are you connected with both concerns, and you are president of the corporation, are you not?

A. Yes, sir.

X Q. 246. And you are the head of the firm of E. L. Harper and Co.?

182 A. Yes, sir.

X Q. 248. And all your business is carried on with the one or the other of these firms?

A. Yes, sir.

X Q. 249. And you have no business outside of that?

A. Well, I had several hundred thousand dollars to pay in Chicago. That didn't go through them. I got hold of it in some way.

X Q. 250. Where did you get this one hundred and twenty thousand dollars which you think went into the construction of the road to make payments with? Did you get it from the Swift's iron and steel works or from the firm of E. L. Harper & Co. or from some bank or from some other place?

A. I could not tell you where I got it.

X Q. 251. You say you may have some drafts on Mr. Gimperling?

A. I may have.

X Q. 252. Will you produce them?

A. I have no file of papers and it may be difficult to get them.

X Q. 253. Will you look for them?

A. Yes, sir.

X Q. 254. Will you produce them?

A. If I can find them.

X Q. 255. Do you know whether you have any receipts for money expended on the road in widening it?

A. I don't know whether I have or not.

X Q. 256. Will you look for them and produce them?

183 A. Yes, sir.

X Q. 257. How long do you remember, Mr. Harper, you were paying out the one hundred and twenty thousand dollars in connection with the operations of the road?

A. I kept a kind of memorandum of it.

X Q. 258. Where is it?

A. I never kept it so I could produce it.

X Q. —. How did you keep it?

A. In my head.

X Q. 260. You wrote it down on the tablet of your memory, did you?

A. Certainly.

X Q. 261. Our memories are very treacherous sometimes.

A. Mine is not.

X Q. 262. Did you take up any of the old iron that was on the narrow-gauge road or did you just simply leave the old iron that was on the track there and widen the gauge to the standard gauge?

A. Just widended the gauge to the standard.

X Q. 263. You did not put any new iron on it?

A. The iron on the road was as good as new.

X Q. 264. I am asking you did you put any new iron on it, or did you just widen it out to the standard gauge?

A. That was what was done. It was virtually new iron. It was not worn a particle; just as good to-day.

X Q. 265. Was the road graded from Allentown to Jeffersonville—the new part of the road that you built?

A. I understand it was not.

184 X Q. 266. Do you know?

A. Only from what my associates told me.

X Q. 267. Did you pay any bills for grading that part of the road?

A. I could not tell you how I divided my matters. I have told you that several times.

X Q. 268. I know I am a little inquisitive, but answer the question?

A. I built the road—I constructed the road.

X Q. 269. You don't know whether you paid for any grading or not?

A. No; I could not tell you.

X Q. 270. Did you pay for any ties?.

A. Well, there were grading bills and ties bills, but I could not separate them.

X Q. 271. At the time you bought this iron at fifty-four dollars per tun to put on the extension from Swift's iron and steel works who was president of the works?

A. I was the president of it.

X Q. 272. Did you not make some memoranda or have some entry made upon the books of that concern in regard to that transaction?

A. Oh, the goods were charged to me the same as to any customer.

X Q. 272. On the books of that concern?

A. Yes, sir.

X Q. 272. Are they in the company's control?

A. They were in the company's office yesterday.

X Q. 275. Are you the president of that company?

185 A. Yes, sir.

X Q. 276. And you say you decline to produce those books on examination here?

A. I don't think I have a right to.

X Q. 277. I want you to decline. Will you bring the books here to be examined?

A. I don't think I have a right to do that.

X Q. 278. Will you bring them?

A. I don't think I have a right to bring them. The books are not my personal property.

X Q. 279. Do you decline to bring them? Answer my question.

A. If my attorneys say that I have a right to.

X Q. 280. I don't want that. Will you bring them?

A. I won't steal for you or anybody else.

Mr. JORDAN: We instruct Mr. Harper to say that the books are open to the inspection of the parties, but he declines to physically bring them here. He will attach a copy of the account to his testimony.

X Q. 281. Will you produce any books of account now in the possession and control of the Swift's iron and steel works, of which corporation you are the president, showing the transaction in which you purchased or claim to have purchased a lot of railroad iron that was used in the making of extensions of the Cincinnati, Columbus and Hocking Valley railroad from Allentown to Jeffersonville and from the western terminus of the old narrow-gauge road to its connection with the Little Miami road on the west.

186 Mr. *H*ORDAN: Produce them where?

Mr. RIDDLE: Here, or at the office of Albert S. Longley, examiner in this case, for inspection.

Mr. JORDAN: We say no.

Mr. RIDDLE: I want the witness to say so.

Mr. JORDAN: We instruct him to say so.

Mr. RIDDLE: I don't want you to instruct him.

Mr. JORDAN: We will let you.

Mr. RIDDLE: What does the witness say?

Mr. JORDAN: We instruct the witness to say no, but he will produce them in the court, if the court desires them.

The WITNESS: Yes; I will do that.

Mr. RIDDLE: Do what?

The WITNESS: Bring them into court, if the court desires them.

Mr. RIDDLE: You bet your bottom dollars you will bring them to court, if the court desires them.

Mr. JORDAN: That is all right.

X Q. 282. I understood you to swear that Preston and McHenry, or one or both of them, were frequently in your office between the 12th of October and the 12th of February, 1882?

A. Yes, sir.

X Q. 283. McHenry was?

A. Yes, sir.

X Q. 284. Do you say that you sent specimen copies of these bonds, before they were executed, signed, and certified to by the
187 Union Trust Company of New York, to Preston and McHenry for examination?

A. I think I handed them to Preston personally.

X Q. 285. Where?

A. In my office.

X Q. 286. When?

A. Along about January.

X Q. 287. What time in January?

A. It was a month, or about, before I got the receipt. I could not tell you exactly. I gave them a bond also to examine the day before I delivered the whole lot and got a receipt in full of all demands.

X Q. —. Is that not probably the only time they ever saw a bond?

A. No, sir; they had an incomplete bond from one to two months before that—a copy.

X Q. 289. What is the value of that road now?

A. That I could not tell you. Railroad property has depreciated a good many hundred per cent. since then, nearly everywhere, all over the country.

X Q. 290. You don't know the value of it to-day?

A. No.

X Q. 291. Did you ever know the value of it as a piece of railroad property?

A. Railroads were booming in 1880 and 1881—they were valuable; but they are now a good many hundred per cent. below then.

X Q. 292. How far is it from Jeffersonville to Columbus?
188 A. I don't know the exact distance.

X Q. 293. How far is it from Cincinnati to Columbus?

A. I don't know the exact distance.

X Q. 294. How far is it from Cincinnati to the western terminus of this road?

A. I don't know, certainly.

X Q. 295. About how far is it?

A. The map will show you.

X Q. 296. Do you know about how far it is?

A. No; I hav-n't it in my mind.

X Q. 297. Is it thirty or forty miles or more?

A. You had better refer to the map.

X Q. 298. I am not asking any captious question.

A. I know; but then I don't know. I have no doubt it is between 30 and 40 miles.

X Q. 299. How far is it from the western terminus of this road to Jeffersonville?

A. 27 or '8 miles.

X Q. 300. About how far would it be from Jeffersonville to Columbus—a rough estimate?

A. I don't know, but I understand it to be eight miles shorter than the Little Miami road.

X Q. 301. Who is John E. Gimperling?

A. He is a gentleman in Dayton, Ohio.

X Q. 302. What was his business at the time the Cincinnati, Columbus and Hocking Valley Railroad Co. was organized?

A. He was building the road—that is, he was running the old road for me.

189 X Q. 303. He was in your employ?

A. Yes, sir.

X Q. 304. Who is Mr. D. P. Hiatt?

A. He is a gentleman in my employ.

X Q. 305. Was he in your employ at that time?

A. Yes, sir.

X Q. 306. Who is Mr. John L. Pfau?

A. He is the sec'y of the Swift's iron *adn* steel works?

X Q. 307. Is he in your employ?

A. He is in the company's employ.

X Q. 308. Was he at that time?

A. Yes, sir.

X Q. 309. Who is E. Snowden?

A. He is a gentleman in the employ of E. L. Harper & Co.

X Q. 310. Was he then?

A. Yes, sir.

X Q. 311. Who is William H. Harper?

A. My brother.

X Q. 312. What was he at that time?

A. A member of the firm of E. L. Harper & Co.

X Q. 313. Is he a partner of yours?

A. Yes, sir.

X Q. 314. Who is Louis Seasongood?

A. A merchant and banker here.

X Q. 315. How much stock did he agree to take?

A. He didn't take any.

X Q. 316. How much did he agree to take when he subscribed to it?

A. None.

190 X Q. 317. Who is George E. Clymer?

A. He is a partner in E. L. Harper & Co.

X Q. 318. Was he at that time?

A. Yes, sir.

X Q. 319. A partner of yours?

A. Yes, sir.

X Q. 320. Who is William C. Herron?

A. He is in the employ of E. L. Harper & Co.

X Q. 321. Was he at that time?

A. Yes, sir.

Adjourned until Saturday, October 24, 1885.

191 SATURDAY, *October 24th*, 1885.

Met, pursuant to adjournment, at the office of Jordan & Jordans, Cincinnati, Ohio.

Present: Messrs. Riddle, Warrington and Boyd, for the complainants; Messrs. I. M. and J. A. Jordan, for the defendants.

ALBERT P. GAHR, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. I. M. JORDAN:

Q. 1. State your age, residence, and employment.

A. M*t* name is Albert P. Gahr; my age, 22; my residence, Cincinnati; my present occupation, assistant secretary of the Swift's iron and steel works.

Q. 2. You may state if you are acquainted with E. L. Harper; and, if so, how long you have known him; whether you were in any way connected with him in business during the year 1881.

A. Yes; I know E. L. Har-er. I have known him for about 8 or 9 years. I was in his employ in 1881 as a clerk in the Swift's iron and steel works.

Q. 3. Have you any knowledge of a contract having been made and entered into between E. L. Harper, W. E. McHenry, J. W. Preston & Co., Preston and McHenry, and Howard Eckert & Co. in the month of October, 1881?

A. Yes, sir; I drafted the contract.

192 Mr. JORDAN: Just state that you did.

Mr. RIDDLE: I object to the counsel telling the witness how he wants his answer.

Q. 4. You may now state whether you were present or not at the time it was drawn and executed; you may also state whether you have the original contract in your possession at this time in this office.

A. I was present when the contract was drawn and executed, and I have the original in my possession.

Q. 5. In whose behalf had you the original contract in your possession?

A. On behalf of E. L. Harper.

Q. 6. You may state fully what you know in regard to said contract, if anything, as to what part you took in the preparation, drafting, or execution of said paper, if anything, and fully state what you did with it, and also state who were present at and during the time.

Counsel for the complainants objects to the question.

A. The paper was brought by Preston and McHenry in a lead-pencil draft and handed to Mr. Harper. Mr. Harper gave it to me to draw up. He said it had been prepared by Mr. Alexander Ferguson.

Q. 7. Mr. Harper said that?

A. I inquired at the time. He told me it was drawn by Mr. Alexander Ferguson for Preston and McHenry, and he wanted me to write it out on the customary legal paper in the proper form. I took it and wrote it out, leaving the amounts or sums to be
193 paid by Mr. Harper to Preston and these other parties blank. These were afterwards filled in. There was present McHenry, Preston, Howard Eckert, and Jos. Wilshire. I am not positive whether Wilshire was present—was present at the time the contract was signed. I know the other three parties were.

Counsel for the complainants move to strike out all the foregoing answer—the conversation report- as having occurred between this witness and Mr. Harper.

Q. 8. You may state whether these persons whom you have named were present at the time Mr. Harper said to you that Mr. Ferguson had drawn the contract.

A. Yes; they were present at the time.

Q. 9. You may state whether you did or did not then copy or draft the written contract, and whether the original contract, which I now submit to you, is in your handwriting.

(Paper handed witness.)

A. Yes, sir.

Q. 10. And you may also look and see whether you are a witness to the contract and whether your name is there as such.

A. Yes, sir.

Q. 11. Who is the other witness?

A. Henry P. Owens.

Q. 12. You have in your testimony referred to some figures that were left blank at the time the original paper was prepared and executed. You may now look at the paper. I call your atten-
194 tion to the part of it to which I have referred.

A. Well, it is the sums in this fifth clause in the agreement and written in afterwards.

Mr. JORDAN: It is agreed, is it not, that this paper is the original, a copy of which, Exhibit A, is attached to the depositions of the complainants already taken? If not, we want to prove it by the witness.

Mr. WARRINGTON: I don't want to make the agreement until we know. We don't dispute it if it is a fact. I don't know.

Q. 13. You may state whether you ever studied law or were in the law office of any lawyer in this city prior to the time of your copying this contract to which you refer. And, if so, in whose law office and how long were you there?

Counsel for the complainants objects to the question as immaterial and irrelevant.

A. I was in the office of Perry and Jenny before I entered the employ of Mr. Harper.

Q. 14. In what capacity?

A. Just as a clerk, drawing papers.

Q. 15. You may state whether you heard any conversation between Mr. E. L. Harper and any of the parties to the contract dated October 12, 1881, and about which you have been testifying at or about the time that that contract was prepared and executed; and,
195 if so, you may state fully what was said by Mr. Harper and these parties at that time or between them and where such conversations occurred.

Counsel for the complainants objects to the question.

A. At the time this contract was signed or just before it was signed I did hear conversations in our office, at number 26 West 3rd street. Just before the contract was signed it is my impression that there was a question asked by some one of these parties—Preston and McHenry, I think only two, I don't know which—how the organization of this road should be affected. Mr. Harper said that he would cause a company to be organized, and he would take all the stock and the stock subscriptions and the bonds of every kind, and he would deed to the railroad company and pay them for these things—the railroad and its franchises or whatever they call it. Mr. McHenry, Preston and Howard Eckert and Harper were present at that conversation, and perhaps Jos. W. Wilshire.

Counsel for the complainants object to the answer and move to strike out so much as relates to conversations between the parties named.

Q. 16. You may also state, after the contract was signed and before the parties left the office, whether anything was said upon this same subject; and, if so, what was said.

196 Counsel for the complainants objects to the question.

A. Well, I am unable to say whether there was anything further said about it at the time, because I didn't make any particular note of it whether it was before or after the signing of the contract. There was a conversation as to how that railroad should be organized. It may be that I don't understand the question in the manner you gave it to me.

Mr. JORDAN: Go on.

The WITNESS: I think I have stated substantially that question—substantially answered that question in my former answer.

Q. 17. You may state whether any of the parties who signed that contract went up and examined the road—the railroad which Mr. Harper owned, and which was mentioned in that contract before the signing of the contract.

Counsel for the complainants object to the question.

A. Yes; they did.

Q. 18. And you may state which parties did.

Counsel for the complainants objects to the question.

A. Preston & McHenry examined the road.

Q. 19. You may also state whether after the time of making that contract any of the parties named in it ever visited or not or came about the office of the Swifts iron and steel works or the office of E. L. Harper and Company, and whether they saw Mr. Harper, and whether you saw them; and, if so, who of said parties do you refer to?

197

A. Messrs. Preston and McHenry were frequently in after the time this contract was signed; also Joseph W. Wilshire; I don't think Eckert was; he may have been in once or twice.

Q. 20. At which place or places did they call upon or see Mr. Harper?

A. At the office of the Swifts iron and steel works.

Q 21. Was Mr. Harper present at the time these parties came there?

A. Yes, sir.

Q. 22. After the making of the contract?

A. Yes, sir.

Q 23. After the making of the contract?

A. Yes, sir.

Q. 24. You may state, if you know, who were the original corporators of the Cincinnati, Columbus, and Hocking Valley Railroad; and, if so, name them as near as you may now remember.

A. The one- I now remember; they were E. L. Harper, Briggs S. Cunningham, Alexander Swift, Lewis Seasongood; I don't remember who the others were.

Q. 25. You may state whether you know who were the original subscribers to the capital stock of the said last railroad Co.; name them so far as you remember them.

Counsel for the complainants objects to the question.

A. As near as I remember, they were E. L. Harper, W. C. Herron, W. H. Harper, John E. Gimperling, E. Snowden, John L. Pfau, J. H. Matthews. I thing Lewis Seasongood subscribed.

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By Mr. RIDDLE:

Q. 26. Was not D. P. Hiatt one of them?

A. And D. P. Hyatt; yes, sir; though I had forgotten that.

Q. 27. You may also now state whether or not any conversation occurred between E. L. Harper and the incorporators or subscribers to the capital stock of said road prior to the time that he subscribed to the stock of said road; and, if so, state what conversation, if any, you heard between him and them or any of them; and, if so, what it was with reference to his subscription and with reference to the road. State fully and in your own way.

Counsel for the complainants object to the question.

A. I heard Harper have a conversation with Mr. Pfau and Mr. Matthews at perhaps different times, when he stated to them the fact that he had the contract with Preston and others, which re-

quired him to organize the railroad company, and they also discussed the plan by which they would organize this road—that is, it is understood, my recollection of the conversation, that he was to subscribe and all the others were to subscribe merely for the purpose of effecting an organization, and that Harper was to
199 have all the stock and stock subscriptions, and that the organization was merely made for the purpose of consum-ating that agreement.

Counsel for the complainants objects to the answer and *and* move to strike it out.

Q. 28. You may state between whom you heard this conversation that you have mentioned in your last answer and state what time it was, as near as you can remember, and whether it was before or a-ter the subscription to the capital stock of said company.

A. I am unable to state the exact time, but I am positive it was before the subscription was made.

Counsel for the complainants objects to the answer and move- to strike it out.

Q. 29. You may mention some of the persons now with whom you heard him have the conversation which you have stated to have occurred.

A. The conversations I heard were between Harper, Pfau, and Matthews. I think there were other persons, perhaps, in the office at the same time, but I don't remember just who they were. They were stockholders or intended stockholders—contemplated stockholders.

Counsel for the complainants object to the answer and move to strike it out.

Q. 30. What, if anything, at the time of this conversation was said in regard to the bonds of the road and who was to have them, if anything was said, and what was to be done with the rail-
200 road when built, if anything. What was said on this subject?

Counsel for the complainants object to the question.

A. Mr. Harper was to have all the bonds and the stock and the stock subscriptions, as I have stated in the previous answer. The railroad was to be deeded to the company in payment of these bonds and stock and the stock subscriptions.

Q. 31. You may now state, if you please, at the times when you said that McHenry or Preston or any of these parties came to the officer after the time that the original contract of October 12th was made what, if anything, you remember to have heard them say or either of them say, Harper or these gentlemen or anybody else, in regard to the road or its construction, if you remember anything.

Counsel for the complainants object to the question.

A. I don't remember anything about that.

Q. —. You don't remember the conversation?

A. No, sir; I don't remember the conversation.

Q. 32. Do you recollect on what business they came upon these occasions to which you have referred after the making of the contract of Oct. 12th?

A. Well, conversations were had, although I don't remember them. My impression is that they came on business relating to that road.

Q. 33. I will ask you to state what you know, if anything, in regard to McHenry or Preston or any of the parties named in that contract receiving the bonds which are referred to in the
201 contract or any part of them, and which were to be delivered by Mr. Harper to them.

Counsel for complainants object to the question.

A. Well, I was present at the delivery of the bonds. The only knowledge I have in reference thereto is the receipts attached to the original contract.

Q. 34. In whose handwriting is the receipt which you refer to?

A. The body of the receipt is in the handwriting of Mr. Harper.

Q. 35. Which receipt are you referring to?

A. Both of them. Howard Eckert and the receipts of Preston & McHenry and Howard Eckert & Co.

Q. 36. You may state whether you recognize the signatures to them as being those of the persons named there.

A. Yes, sir; they are their signatures.

Q. 37. You may read them and make them a part of your evidence and keep those receipts.

Mr. RIDDLE: They are already in as exhibits.

Mr. JORDAN: I would like to have them made a part of the evidence.

The witness reads:

"CINCINNATI, *Feb.* 9, 1882.

Received of E. L. Harper five hundred doloars, par value 1st mortgage, and three hundred dollars, par value of the income bonds of the Cincinnati, Columbus and Hocking Valley Rail-
202 way Co., numbers 201, 248, 249, and 250, in full of all demands on the contract of October 12th, 1882.

HOWARD ECKERT & CO."

And:

"CINCINNATI, *Feb.* 11*th*, 1882.

Received of E. L. Harper two hundred and fourteen thousand dollars, first mortgage, and one hundred and seven thousand and two hundred dollars of income bonds of the Cincinnati, Columbus and Hocking Valley Railway Company, in full of all demands on the within contract.

W. E. McHENRY.
J. W. PRESTON & CO.
PRESTON AND McHENRY.
HOWARD ECKERT & CO.,
Agents for W. E. McHenry and Preston & McHenry.'

Counsel for the complainants object to the answer and move to strike out the last question and answer, both of them.

Q. 38. You may look at the paper which I now hand you, being the paper dated October 12th, 1881. A paper purporting to be a receipt bearing date of February 9, 1882, is the receipt of Howard Eckert & Co. for the bonds due them on that contract, and the receipt dated Feb. 11, 1882, is the receipt of McHenry and the other parties. Is it necessary to name them?

Mr. JORDAN: No, sir; as the signature to the papers show, being their receipts for the bonds. You can say I identify this paper by marking my initials on the back of it.

Mr. WARRINGTON: Identify each of the papers by putting my initials upon each of them.

203 Mr. JORDAN: The other two having been, as counsel have agreed already, made part of the testimony.

A copy of the Howard Eckert and Co. receipt is hereby attached, marked Exhibit A, Ghar. The contract and the other receipt attached to it are already in evidence as part of the testimony of the complainant-, marked "A."

Q. 39. You may further state, Mr. Gahr, what you know, if anything, in regard to any of the parties whose names are attached to the contract and who are entitled to the bonds under it going to see the road before the time they accepted the bonds which you have referred to.

Counsel for the complainants object to the question.

A. They examined this road before they accepted the bonds—before they came to receive the bonds.

Q. 40. Do you mean after it was finished?

A. I mean before they came to receive the bonds; I don't know about the completion of it.

Q. 41. You may state about how near it was to the time when they received the bonds that those parties went to visit the road?

Counsel for the complainants object to the question.

A. It was a few days before.

204 Cross-examination by Mr. WARRINGTON:

X Q. 42. How old were you when the first conversation occurred as you related it?

A. 18.

X Q. 42. Are you sure?

A. Yes, sir; the contract was dated October 12, 1881. That was four years ago.

X Q. 44. How long had you been in the employ of the Swift's iron and steel works?

A. At that time?

X Q. 45. Yes, sir.

A. About 2 years.

X Q. 46. In what capacity?

A. Just as junior clerk; I was attending to the correspondence principally.

X Q. 47. Whose correspondence?

A. The Swift's iron and steel works'.

X Q 48. Where were you located?

A. At number 26 west 3rd street.

X Q. 49. Where is that with reference to the office of E. L. Harper?

A. He has his office in our office. He is president of the concern.

X Q. 50. Was that so then?

A. No, sir; he was not president at that time.

X Q. 51. Where was his office at that time?

A. It was there; he was one of the officers.

X Q. 52. Was not his office in the adjoining room?

205 A. No, sir; not generally.

X Q. 53. What do you mean by generally?

A. I mean to say that he devoted the major part of his time in our office.

X Q. 54. He was conducting a business of some kind under the name of E. L. Harper & Co., was he not?

A. Yes, sir; before he came into the Swift's iron and steel works.

X Q. 55. Where was the place of business of that company at that time?

A. Two doors west from us.

X Q. 56. That was then # 30?

A. Yes, sir.

X Q. 57. Who attended to that business?

A. My impression is that Mr. Clymer or his brother attended to it at that time. I don't really know.

X Q. 58. How many were in number 26 with you—how many other persons? I mean in the employ of the Swift's iron and steel works.

A. Do you mean employees in the office?

X Q. 59. Yes; I mean employees in the office of the Swift's iron and steel works as distinguished from the other business.

A. Mr. Pfau, myself, and a book-keeper by the name of Sextro.

X Q. 60. Where was your desk?

A. In that office?

X Q. 61. Yes.

206 A. Where it is at present.

X Q. 62. Where is that?

A. About the centre of the office.

X Q. 63. Where was Mr. Pfau's with reference to yours?

A. About as far as that desk from me—6 feet.

X Q. 64. Which direction?

A. An easterly direction.

X Q. 65. Was Pfau present when this conversation occurred?

A. I think he was present during some of it. I am not positive whether he was present during all of it or not.

X Q. 66. Are you positive that he was present and heard any of it?

A. Yes; he was there at that time that Mr. Preston and McHenry called, I know.

X Q. 67. That is not the question of Preston and McHenry calling. Was Mr. Pfau present and did he hear, so far as you know, any of these conversations?

A. I think he did. He must have heard them. We both occupy the same position almost.

X *W.* 68. Didn't all the conversations that occurred between E. L. Harper and the other parties whom you have named, namely, Preston, McHenry, Wilshire, and Eckert, take place at # 26, the office of the Swift's iron and steel works?

A. All that I heard did.

X Q. 69. Have you stated all the conversations that you can recollect?

207 A. Well, as far as I can remember, I think I have.

X Q. 70. Did you take any memoranda at either of these conversations of what occurred?

A. No, sir; I am not a short-hand reporter.

X Q. 71. Did you make any note or memoranda of the parties present or what they said?

A. No, sir; my statements of the conversations are only my recollection of them.

X Q. 72. When was the first time that you attempted to state your recollection after these conversarions happened?

A. I think this is perhaps the first time.

X Q. 73. In delivering your testimony this morning?

A. Yes, sir.

X Q. 74. Are you sure of it?

A. Yes, sir.

X Q. 75. Do you mean that you have stated nothing to Mr. Harper or to his counsel between the dates of the conversations and this morning?

A. Yes, sir.

X Q. 76. You so swear?

A. I have not said anything about these conversations from the fact that I was absent when this testimony was taken.

X Q. 77. Did you this morning before you testified state these conversations to any one?

A. No, sir.

X Q. 78. Do you know how any one knew that you had any knowledge of the conversations?

208 A. From the very fact that I was a witness to the contract—that I was there when the thing was talked over and arranged. I don't know who informed Mr. Jordan. He seen the *the* contract with my signature to it.

X Q. 79. And that is the only way in which you account for being called here?

A. That is the perfectly natural way of it. My signature is attached to the contract.

X Q. 80. Was Mr. Harper at that time interested in the Swift's iron and steel works?

A. Yes, sir.

X Q. 81. Is that a corporation?

A. Yes, sir.

X Q. 82. Was it then?

A. Yes, sir.

X Q. 83. How much stock did Mr. Harper have in it?

Counsel for defendants object to the question.

A. I am not able to tell you. He never trusted me to keep it for him.

X Q. 84. Who was present when Mr. Harper gave you the pencil draft to which you refer?

A. Mr. Harper, Preston, McHenry, and this book-keeper I have named, I think, were all there.

X Q. 85. What is the book-keeper's name?

A. Henry J. Sextro.

209 X Q. 86. Where was Mr. Harper's desk located with reference to yours?

A. It was 6 feet from mine.

X Q. 87. In which direction?

A. Easterly.

X Q. 88. I refer to Mr. Harper.

A. Yes; I understand. There was only one Harper about.

By Mr. RIDDLE:

X Q. 89. Was Mr. Harper's desk on one side of yours?

A. Yes, sir; my desk was the western limit ef the office; Harper's was about 6 feet east of mine; Pfau about 6 feet east of Harper's, making him right between two of us at that time. The office since then has been modified; enlarged twice what it was then.

By Mr. WARRINGTON:

X Q. 90. What did you do with the lead-pencil draft of the contract?

A. I am unable to tell you.

X Q. 91. Do you know where it is.

A. No; I don't. I think I returned it to Mr. Harper when I completed the originals—that is, completed these copies.

X Q. 92. How long was it after you received it that you began and completely copied it?

A. At least not more than half an hour; I started and I completed it about from 4 to 6 o'clock.

X Q. 93. How many copies did you make?

A. 3 at that time; I don't think I have made any since.

X Q. 94. How long after they were copied was it before they were executed?

210 A. Oh, perhaps 20 minutes or a half hour.

X Q. 95. Well, at what hour did Wilshire and Eckert appear at that office?

A. Well, now, I cannot tell you. I don't remember, but I think that they were there perhaps half an hour; it might not have been so much. I merely state my recolloction before that contract was consum-ated.

By Mr. RIDDLE:

X Q. 96. Do you know whether Eckert was there at all or not?

A. Yes; I do.

By Mr. RIDDLE:

X Q. 97. Did he sign the paper?

A. He did; yes, sir.

By Mr. RIDDLE:

X Q. 98. There is a difference between you and Mr Harper.

A. Well, I think he signed the paper.

By Mr. WARRINGTON:

X Q. 99. If I understand you it took you half an hour to copy these three papers, but not more than that.

A. I will not state right certain.

X Q. 100. Well, what did you say?

A. If you will kindly read the answer you will get your information.

X Q. 101. How long did it take you to draft these contracts?

A. Half an hour it required to draw up these three.

X Q. 102. Did you say that Preston, McHenry, Wilshire, and Eckert were all there half an hour before you had completed the contract?

211 A. Do you mean before it was signed?

X Q. 103. No, before it was completed.

A. No; they were not there waiting for me to finish writing, but they came in before I finished.

X Q. 104. Have you told me what time elapsed before the signing after the completion of the contract?

A. Yes; I said 20 minutes or a half an hour.

X Q. 105. How long did these gentlemen stay until it was executed?

A. Perhaps ten or fifteen minutes; you know I didn't watch the lapse of time.

X Q. 106. You never paid any attention to it particularly?

A. I say that I didn't watch the clock; I didn't suppose I would have to prove an alibi.

X Q. 107. What part of the conversation that you have related occurred before the copying of the contracts?

A. This conversation that I heard didn't occur before I started copying the contracts, but before I completed them.

X Q. 108. Did you hear any conversation between these gentlemen and Mr. Harper before you finished making the contract?

A. Yes, sir; I heard a conversation.

X Q. 109. Have you repeated any of it?

A. I think not.

X Q. 110. What was done by the parties immediately after signing the contracts?

212 A. Well, my impression is that they had some general conversation about the prospects of that road—what they would do with it, talk about extending it; that was the substance of the conversation.

X Q. 111. You can repeat its import, can you not?

A. No, sir; I cannot.

X Q. 112. Can you tell us how long it continued?

A. I cannot; perhaps five minutes.

X Q. 113. Did they all leave the office then?

A. I think they left. Let us see. Yes; they did all leave.

X Q. 114. Including Mr. Harper?

A. No, sir; they left without Mr. Harper. That is my recollection.

X Q. 115. What time did you go home that evening?

A. Later than usual. I think it was half past six.

X Q. 116. Was Mr. Harper there when you left?

A. I am not positive on that score.

X Q. 117. Was Mr. Pfau gone?

A. I think he was not.

X Q. 118. Was Mr. Sextro?

A. No; Sextro left before I did.

X Q. 119. At the time the contract was signed was Mr. Pfau there?

A. No, sir.

X Q. 120. Or Sextro?

A. Sextro may have been in the office. I don't remember.

X Q. 121. How long before the contract was signed was it that Pfau left the office?

213 A. Pfau was not in the office that day at all.

X Q. 122. He was not?

A. No, sir; not on the 12th of October.

X Q. 123. Who were present when any conversation occurred as to how the organization could be effected?

A. Mr. Harper, myself, Preston, McHenry, and perhaps Eckert.

X Q. 124. Was any one else?

A. No, sir.

X Q. 125. You tell now just what was said by Mr. Harper there.

A. Some one of the parties asked how this organization could be effected. Mr. Harper, in reply to that question, said that he would cause a corporation to be formed: that he should have all the stock, stock subscriptions—in fact, the securities of every kind proposed—in payment of the railroad, which he would deed to the railroad company in order to consummate this contract.

X Q. 126. Was that all he said?

A. That is the substance of it.

X Q. 127. When was that?

A. That was before the contract was signed—during the time of the signing of the contract.

X Q. 128. Well, you say it was before and during the time of the signing of the contract. Let us see how much of it was said before the contracts were signed.

214 A. I didn't observe the time, but they signed the contract while that conversation was going on. I don't know whether any of the gentlemen were standing there with pen in hand affixing their signatures or not, but it was during that time that I was witnessing the signatures—preparing the papers to be signed—and they were in the act of finishing the thing by affixing their signatures.

X Q. 129. Had all of them signed?

A. No, sir.

X Q. 130. Who had signed?

A. I am not positive that anybody had signed.

X Q. 131. Then, is it your best recollection that anybody had signed it when this was said?

A. I won't answer that question, because I didn't observe it.

X Q. 132. Are you able to state that any one of them had signed it before that was said?

A. No, sir; I am not able to state that.

X Q. 133. The- you don't know whether it occurred before or after the signing?

A. I think it was before.

X Q. 134. Are you positive on such a point?

A. If you will let me explain, I think I can give a satisfactory answer. I will not say that the conversation took place when Preston, McHenry, Wilshire, or Eckert may have been signing the contract—affixing their signatures to the contract—but the mat-

215 ter didn't impress itself upon my mind in regard to the exact minute (I do remember the call) that I can remember it now.

X Q. 135. Did it impress itself on your mind at all?

A. Why, if the thing didn't impress itself I cannot remember it.

X Q. 136. Do you know who asked the question which brought out the response that Harper made?

A. I think it was either Preston or McHenry. It was one of those two. I am positive as to that.

X Q. 137. Do you know one of these gentlemen from the other?

A. I do when I see them. Mr. Preston was distinguishable by his red nose. I could point him out on the square anywhere. I think I should know them if I were to see them. I am perfectly willing to say that none of them are in sight now. (After a pause:) Mr. Warrington might as well ask me to state five years to come where I was at twelve o'clock to-day and expect me to remember.

X Q. 138. You have repeated now all the conversation then, have you, concerning the organization?

A. I believe I have in my testimony.

X Q. 139. I mean here in answer to my question.

A. I think I have repeated a great deal of the substance of it.

X Q. 140. Is there anything else that you can recollect that was said by anybody at the time and place stated on the subject
216 of the organization and how it could be effected?

A. Do you mean at the time the contract was signed?

A. Yes, sir.

A. I think I have stated it all.

X Q. 141. That is, you mean you have stated it all in answer to my questions?

A. I think I have stated the substance of your questions.

X Q. —. Could you state anything more that was said by any one at that time concerning that subject? If so, do it.

A. I don't think of anything else except what I have stated.

X Q. 143. Except what you have stated to me?

A. Yes, sir.

X Q. 144. Is not this true, that when Mr. Harper spoke to his employees concerning their becoming directors in the organization of this company he said that he desired them to become directors?

A. I don't know anything about that except so far as it relates to the conversation that Harper had with Pfau and Matthews.

X Q. 145. Did you ever hear any conversation between any persons who afterwards became directors and Harper excepting Pfau and Matthews?

A. I think I heard conversations with other persons, but I am unable to name them.

X Q. 146. Mr. Pfau was at that time in the employ of the Swift's iron and steel works, was he not?

A. Yes, sir.

217 *A. Yes, sir.*

X Q. 147. Mr. Matthews is Mr. Harper's brother-in-law, is he not?

A. I have that impression; I don't know.

Mr. JORDAN: We agree he is.

The WITNESS (continuing): I was not present at the marriage; I don't know the fact, but I think he is.

X Q. 148. Where was he employed at that time?

A. He was in the Swift's iron and steel works, I think.

X Q. 149. In what capacity?

A. As book-keeper.

X Q. 150. Now, what did Mr. Harper say to them?

A. He explained this contract of Preston to them, and he stated that in order to consummate that contract it would be necessary to organize a railroad Co. He wanted them to co-operate with him by subscribing. Of course, they had to have enough stock to qualify them as acting officers of the incorporation, and he explained that there would be nothing in it except that they would just co-operate in carrying out that contract—the terms of that contract.

X Q. 151. Is that all?

A. That is the substance of it, I believe.

X Q. 152. What did Mr. Pfau say in answer to that?

A. Well, I think he assented to it. So far as I know, he said, "All right."

X Q. 153. What did Mr. Matthews say?

A. He was agreeable.

X Q. 154. What did he say?

218 A. He said, "All right." What would any gentleman say under the circumstances?

X Q. 155. Where was that?

A. In the office—the Swift's iron and steel works office.

X Q. 156. When was it with reference to the time that the contract had been signed?

A. I think it was, perhaps, a few weeks after.

X Q. 157. Could you remember any more definitely?

A. No, sir; I could not, sir. I could not give the exact time.

X Q. 158. Did Mr. Harper have the contract in his hand at the time?

A. I think not.

X Q. 159. He might have had it?

A. I think not.

X Q. 160. So far as you know, the conversation occurred in the absence of the contract?

A. So far as I know; yes, sir.

X Q. 161. What did he say to them, or what do you mean by saying that he explained to them this contract? State just his words as near as you can.

A. I cannot state his words. The substance of that conversation was this: That he told them that in order to settle up this Chicago transaction he had made a contract with Preston and these other parties to extend that railroad and complete it as the con-

219 tract provides, and he had to form a new corporation with a new name in order to carry out the terms of that contract; therefore he wanted subscribers to the stock and he wanted officers to the concern in order to enable him to use the bonds legally, and he wanted them to subscribe to the stock, of course, to be qualified, and he was to have all the stock.

X Q. 162. Is that all he said?

A. Yes, sir; as much as I remember of it.

X Q. 163. How do you know that Preston or McHenry went to examine the railroad?

A. Will you fix the time?

X Q. 164. At any time.

A. They were there after the occasion of both of their visits to the railroad and stated the fact.

X Q. 165. Who were present when they stated the fact?

A. Mr. Harper on the first occasion, and myself and this man Sextro were all that were present besides these gentlemen, Mr. Preston and McHenry.

X Q. 166. How as to the 2nd time?

A. Before they got the bonds, you mean?

X Q. 167. Yes, sir.

A. Well, I know I and Harper were present. I don't know whether Matthews was present or whether Pfau was present or not.

X Q. 168. Did Mr. Harper state at either of these conversations that he would subscribe for the stock, and that these other
220 parties would also subscribe for the stock or any part of it?

A. I don't remember about that. I don't remember any of the conversation about the other persons subscribing.

X Q. 169. Do you mean to say that they didn't tell him that they would subscribe for stock?

A. No, sir; I say that I don't remember.

X Q. 170. And you say that you don't remember anything about his subscribing for stock?

A. Yes, I do remember.

X Q. 171. What did he say?

A. They discussed the subject there.

X Q. 172. Now, you are referring to the time the contracts were executed?

A. Yes, sir.

X Q. 173. But what did he say about subscribing for stock?

A. He said he would cause an organization to be effected, and of course he would have to subscribe for the stock, and that he would have the stock subscriptions whether he subscribed for them or not.

X Q. 174. Did he state in that communication that he would subscribe for the stock?

A. He said that he should have the stock and stock subscriptions. How he expected to get it I don't know, unless he expected to get it by subscription.

X Q. 175. Now, do you mean that he didn't say he would subscribe for any of the stock?

A. I don't know the exact language, but he didn't say I
221 will subscribe for so much stock, but I am to have the stock and stock subscriptions, together with the bonds.

X Q. 176. And he didn't say that he would be a subscriber himself?

A. He didn't state that he would be a subscriber for any specific amount.

X Q. 177. Did he say he would be a subscriber for any amount?

A. I don't remember that he did.

X Q. 178. Did he say that either of the other gentlemen with whom he was associated were to be subscribers?

A. I don't remember that he did.

X Q. 179. You would have heard it if he had?

A. Perhaps I would, if I was not otherwise occupied.

X Q. 180. Then you were otherwise occupied during a part of the conversation, and there were some conversations that you did not hear?

A. There might be.

X Q. 181. Is that so?

A. I cannot say positively.

X Q. 182. Did he tell you that Lewis Seasongood would be a subscriber?

A. I don't think he did.

X Q. 183. Did he tell you that any of these other persons whom you have named and who were employés of the Swift's iron and steel works would be subscribers?

A. He didn't say whom would be subscribers for the stock;
222 he didn't name any of the persons who would subscribe for the stock.

X Q. 184. Did he say that he would be the owner of all the stock of that company?

A. He said that in order to effect the organization that he was to have all the stock and the stock subscriptions, together with the bonds.

X Q. 185. He didn't tell them precisely how he would organize the company?

A. Not, except as I have outlined, I don't think.

X Q. 186. The substance of it and effect of it was then that they had no interest in the way that company was to be organized?

A. They had no interest?

X Q. 187. Yes, sir.

A. They certainly asked how it would be organized. That would show interest.

X Q. 188. They were not to participate in the organization. Did he say anything on that point?

A. I think he did.

X Q. 189. What did he say?

A. I don't remember except the recollection that he did ask at that time.

X Q. 190. Tell me what he said. To whom did he address himself?

A. I don't remember which one it was.

X Q. 191. What did the person respond? In what way did the person respond whoever it was?

A. I think he said something at the time about not wanting any of the stock.

X Q. 192. Which one was it?

223 A. I am unable to tell you which one it was. I don't remember.

X Q. 193. Are you sure that he was there?

A. I am sure that he was there; yes, sir.

X Q. 194. You have said that Lewis Seasongood was a subscriber for the stock?

A. Yes, sir.

X Q. 195. For how much?

A. I don't think he subscribed for any amount.

X Q. 196. Did you see the bonds at all?

A. No, sir; I did not.

X Q. 197. I am not referring to the bonds of this company and the ones that Mr. Harper delivered to the Chicago parties.

A. I didn't see them delivered; no, sir.

X Q. 198. Did you see the parties sign the receipts?

A. No, sir.

X Q. 199. Do you know when they signed the receipts?

A. Only by the dates on the contract.

X Q. 200. That is all you know about it?

A. That is all I know in reference to the signing of the receipts.

X Q. 201. Do you know where the parties were when the receipts were signed and delivered?

A. No, sir; I do not know.

X Q. 202. Do you know where they were at the times the bonds were delivered?

A. No I do not. In Cincinnati, that I know.

X Q. 203. Can you tell me the date that you heard either
224 Preston or McHenry say that he had been up to *to* see the road after the execution of the contract?

A. Do you mean before they received the bonds?

X Q. 204. I am asking after the execution of the contract.

A. My impression is that that was 2 or 3 days before the receipt of the bonds.

X Q 205. How do you fix that?

A. I know they were in the city before that receipt was given.

X Q. 206. How can you fix the date with reference to that, seeing that you know nothing about the time the receipt was made and delivered, except as you see it on the receipt?

A. That is the only way I can identify it, by the date of the receipt. Mr. Harper told me when he delivered the bonds that he fixed it up.

X Q. 207. That is all you know about them?

A. Yes, sir; it was a few days before he got the bonds.

X Q. 208. How many days?

A. 3 or 4 days. I could not tell you the exact date. If you will tell me the date of the receipt I can probably tell you.

X Q. 209. It was February 11th.

A. It was 3 or 4 days before that.

X Q. 210. How do you know it was the 11th of Feb. that he told that he had delivered the bonds?

A. I saw the receipts for the bonds. I could only tell from the date of the receipt.

225 X Q. 211. When did you first see the receipts?

A. I think he showed it to me or told me that right after he got it.

X Q. 212. Who was present?

A. I don't think anybody was present except himself and I.

X Q. 213. Was Harper in the habit of communicating to you such matters as that?

A. That is a part of my duty.

X Q. 214. When was it that you first saw the receipt?

A. It has been, I guess, two years; perhaps longer than that.

X Q. 215. No, no; with reference to February 11—when was it you first saw the receipts?

A. I think that likely I saw the receipt the day it was received or a few days after.

X Q. 216. Are you sure it was more than a day prior to the 11th of February that you heard Mr. Preston and McHenry say that they had been up to see the road?

A. More than a day prior—no, sir; I am not positive on that fact; I cannot give you the exact dates.

X Q. 217. Do you think it was as much as a day before?

A. Do I think it was as much as a day before?

X Q. 218. Yes, sir.

A. I think so.

X Q. 219. How much than a day?

A. I am unable to say. I think it was two or three days. I think that is what I said, 3 or 4 days.

226 X Q. 220. And that is what you adhere to, is it?

A. That is what I think; yes, sir.

X Q. 221. Was it not five or six days or probably two before?

A. No; I think not.

X Q. 222. You feel sure of it, do you?

A. I feel pretty sure.

By Mr. RIDDLE:

X Q. 223. Was it not more than two days before?

A. I think it was; yes sir.

By Mr. RIDDLE:

X Q. 224. You don't recollect what they said about it?

A. No, sir.

227 JOHN L. PFAU, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by ISAAC M. JORDAN:

Q. 1. State your name, age, residence, and business.

A. John L. Pfau; age, 49; residence, 76 Ohio ave., Cincinnati, Ohio; occupation, secretary of Swift's iron and steel works, a corporation doing business in Cincinnati.

Q. 2. And it has its mill in Kentucky?

A. Yes, sir.

Q. 3. State whether you are acquainted with E. L. Harper and how long you have known him.

A. I have known him about 10 or 12 years.

Q. 4. What connection had he with the Swift's iron and steel works?

A. He was an officer of the corporation.

Q. 5. Was he carrying on any other business at that time?

A. He was also of the firm of E. L. Harper & Co.

Q. 6. You may state where, in 1881, the Swift's iron and steel works had its place of business in this city, and where E. L. Harper & Co. had their place of business in this city.

A. The Swift's iron and steel works' Cincinnati office was at #26 West 3rd St.; E. L. Harper & Co.'s office was at #30 West 3rd St.

228 Q. 7. You may now state whether you are acquainted with J. W. Preston and W. E. McHenry, Howard Eckert & Co., and Jos. W. Wilshire.

A. I know Jos. W. Wilshire personally. I think I may have been introduced to one or both of the others, but the acquaintance, if any, is very slight.

Q. 8. You may state whether Mr. E. L. Harper had any business transaction with any or all of these persons; if so, in a general way, what kind of business or transactions.

A. The 3 named came to the office frequently and saw Mr. Harper.

Q. 9. You may state whether he had any dealings or operations with them in connection with operations on the Chicago board of trade.

Counsel for the complainants objects to the question as immaterial.

Q. 10. State whether you know of his having any.

A. It was so generally understood.

Counsel for the complainants object to the answer and move to strike it out.

Q. 11. You may now state whether Mr. Preston, McHenry, Howard Eckert & Co., or any of them, had ony business transactions with Mr. Harper in the fall of '81 in connection with any railroad transactions, not going into particulars.

A. He had, as far as in a general way as I know.

229 Q. 11. You may state now what Mr. Harper said to you, if anything about having made a contract with the parties named with regard to constructing a railroad and transferring to said parties any bonds or anything of that kind.

Counsel for the complainants object to the question.

A. He said that these parties claimed that he owed them a large sum of money.

Q. 12. On what?

A. On account of grain deals, and he questioned his liability to any considerable extent under it; but, in order to get a settlement, he had proposed to give them certain securities upon this railroad that he had bought some time previous by organizing a railroad for the purpose.

Counsel for the complainants object to the answer and move to strike it out.

Q. 13. You may now state, in connection with that matter, what he said, if anything, about proposing to organize a company.

Counsel for the complainants object to the question.

A. He said he wished for me to act as one of the incorporators

with several others for the purpose of organizing this railroad as a company.

Q. 14. For what purpose did he state, if any, he wanted to organize this company, and why?

Counsel for the complainants object to the question.

A. For the purpose of getting a corporation, making some alterations and additions, and issuing bonds and income bonds,
230 a portion of which he proposed, I believe, to transfer to these parties.

Q. 15. You may state now whether Mr. Harper had any conversation with you and with any other persons in the fall of '81 on the subject of organizing a railroad in connection with carrying out any arrangement that he had made with Preston, McHenry, and others; and, if so, what he said upon that subject.

Counsel for the complainants object to the question both as to form and substance.

A. He had such a conversation.

Q. 16. With whom?

A. With myself and several others in my presence.

Q. 17. Who were the others?

A. Well, I think it was Major Clymer, I believe, J. H. Matthews, D. P. Hyatt, Mr. Snowden, and W. H. Harper.

Q. 19. What did he say in regard to that matter?

Counsel for complainants object to the question.

A. Well, he said that we were to organize. He said he wanted us to subscribe the capital stock of the road, and he would subscribe some, to be paid for by the railroad and the improvements and additions that were intended to be made to it, and that he could not act as a director, and wanted myself and others to organize the road and make a contract with him for the building of it and its purchase. I believed that the road, if certain connections were
231 made, would be valuable property, and I was anxious to see him succeed in it and further it.

Counsel for the complainants object to the answer and move to strike it out, especially that part in which the witness states his belief and desire.

The WITNESS, continuing: That was one of the reasons why I joined in the matter.

Counsel for the complainants renew their objection and motion as to subsequent statement of witness.

Q. 19. You may state anything further that was said by Mr. Harper to you and to these other persons about the purpose for which that organization of the company was to be effected. What did he say on that subject, and what was the arrangement made between you parties on that subject at that time?

Counsel for the complainants object to the question.

A. The object of the organization was so that we might pay him and he receive for the road and its improvements the first mortgage, the income bonds, and a certain quantity of stock which he subscribed—paid-up stock.

Counsel for the complainants object to the answer and move to strike it out.

Q. 20. You may state how early that arrangement was made in connection with the talk about the organization of this road.

232 A. That was before or after the stock was subscribed by you and him?

—. ——.

A. Yes, sir.

Q. 22. I say was it before or after?

A. I say before.

Q. 23. Before the stock was subscribed to?

A. Yes, sir.

Q. 24. Now, then, whereabouts did this conversation that you have been referring to take place?

A. When it first commenced, in our office, and then afterwards in E. L. Harper's office.

Q. 25. I understood you to state that this conversation took place before any taking of stock in it.

Counsel for the complainants object to the question, both as to form and substance.

Q. 26. State whether Mr. Harper after this made any proposition that you know of to the company for the purpose of constructing the road.

A. After we had organized he made the proposition in effect what had been talked about before the organization. He made that proposition in writing.

Q. 27. What was done with that proposition by the company?

A. The board of the company accepted it.

Q. 26. Was that accepted in writing or by resolution? In what way?

233 A. It was by resolution of the company directing the officers to carry out the contract—the proposed contract.

Counsel for the complainants object to the answer and move to strike it out.

Q. 29. Do you know whether Mr. Harper did or did not enter upon the construction of the railroad in pursuance of the arrangement that had been made?

A. I understand from the report of the manager, Mr. Gimperling, afterwards that it was in course of construction and change of gauge.

Q. —. You may state whether you know of either of Mr. McHenry or Mr. Preston being here at any time or about the time or shortly before the arrangement between you and Mr. Harper and these other gentlemen for the organization, both before and afterwards.

—. ——.

Q. 31. When they came here before the organization of the company you may state whether you heard either of them say anything upon the subject of going up to visit the railroad that Harper was then the owner of.

A. I heard one of them inquire as he was going out with Mr. Harper when the train was going up, when he could go up to the road, and what arrangements would be made for showing
234 him over the road. Something was said about the time-table and some questions were asked about the trains—how he could go over the road—as they were going toward the door.

Q. 32. Do you recollect who that was? If you do not remember the name, describe the person.

A. I think they were the two gentlemen from Chicago—Preston and McHenry and Wilshire, whom I knew pretty well; had known for some time before. These other two I didn't pay any attention to, because it was Mr. Harper's private business. He had a light mustache, the small one had.

Q. 33. Was there one or more at the time he made this statement that you speak of?

A. I cannot recollect whether there was one or two that day. My impression was that both were here, but they might not have made this social call. Only one might have been there. I cannot say positively.

Q. 34. Do yon know anything yourself of Mr. Harper delivering to these parties that you have been naming any bonds of the road which you aided in organizing?

A. I didn't see the delivery.

Q. 35. What knowledge have you on the subject?

A. I have seen the receipt purporting to cover the delivery.

Q. 36. Do you recollect after the time you have first spoken
235 of when either Mr. McHenry or Preston made the statement to you about going up to visit the road and after you had aided in the organization of the road? Do you remember of Mr. McHenry or Preston visiting or calling upon Mr. Harper at his office?

A. Oh, they came there a number of times, I think, after that.

Q. 37. Both of them?

A. One or both; I think both.

Q. 38. What knowledge have you of railroads?

A. Well, we had sold about that time—we had sold 3 or 4 years previously—some years previously—we had sold a great deal of iron, railroad iron, splice bars, spikes, and track bolts.

Q. 39. The business that you are in, does it manufacture railroad iron?

A. Yes, sir; we did this some years before.

Q. 40. Did you deal pretty largely with railroads?

A. Yes, sir.

Q. 41. In furnishing them materials?

A. With a number of them.

Q. 42. How far did that lead you to investigate the cost of construction of roads and how far did it necessarily do so in carrying on the business intelligently?

A. You see we furnished a major part of that iron of that railroad originally when it was known as the Washington, Port William and Jefferson railroad. I was over the line of the road a number of times, making collections of subscriptions turned
236 over to us by the road on account. They owed us considerable money, and I took particular pains to advise myself of the amount of money subscribed and spent and what the nature of the security would be, we having taken a number of their bonds as collateral security.

Counsel for the complainants object to the question and move to strike it out.

Q. 43. To what extent was there a necessity that you should know the value of railroads in your dealing with them?

A. Well, as an element of security for our account.

Q. 44. Well, have you had occasion to investigate that matter thoroughly or otherwise?

A. Well, I did go into it by questioning the directors and engineers, the then president, Mr. Ely, and the directors, John Marchant, Dr. Hussey, Mr. Kirk, and the 2 members; I have forgotten their names.

Q. 45. Well, did you have occasion to do it in one or more instances?

A. Well, in a good many.

Q. 46. Now, taking that road as you saw it——

A. I would frequestly go over the line of roads, and the men who wanted to boy of us would show the original expense, the
237 coast, and how much had been — as a matter of security for any purchase they would make, to show that they were not in debt. They would state their cases as merchants would who were going to buy goods.

Counsel for the complainants except to the latter statement and move to strike it out.

Q. 47. Now, taking into consideration the road as it then was before it was changed, while it was a narrow gauge, what you knew of it, of its cost, and what you considered would be its value if extended and widened by Mr. Harper's proposition, in view of its connections east and west, what, in your judgment, would you consider the road to have been worth finished as he proposed to finish it?

Counsel for the complainants object to the question.

A. The road up to the time Mr. Harper bought it, as near as I can learn, cost, I think, between three and *and* four hundred thousand dollars, or represented that much property. There were a great many donations of right of way, things of that kind not converted into money and paid for by money. It cost when he bought it about between three and four hundred thousand dollars. That is one of the reasons why I urged him to buy it, because I thought it was a good purchase.

Counsel for the complainants object to the answer and move to strike it out.

238 *Counsel for the complainants objects to the answer and move to strike it out.*

Q. 48. Now, answer the question in regard to what your judgment would be in regard to the value of all these proposed changes.

Counsel for the complainants object to the question.

A. If it were widened and extended as proposed the line, of course, would be worth considerable more than it was originally. With good connections it might be worth all the way from half a million to a million dollars.

Counsel for the complainants objects to the answer and move to strike it out.

Cross-examination by Mr. WARRINGTON:

X Q. 49. The transaction which took place between Mr. Harper and you gentlemen as directors of the railroad company is all in writing, is it not, Mr. Pfau?

A. All the official acts of the board are in writing and the company, I believe.

X Q. 50. All that you did in an official way—that is, in reference to this railroad and the bonds and the stock—appears in writing in the minutes of the company?

A. I think they do, the minutes of the railroad, and approved always.

X Q. 51. And the conversations that you had and which you have related were finally reduced to writing and there we
239 can find them, can we not, in the minutes—that is to say, the substance and effect of them?

A. They should so appear. That was the intention of the minutes and the action of the board carrying out the agreement and the understandings had before the organization—the purport and object of the organization.

X Q. 52. You have seen the minutes, have you not?

A. I saw them while we had our meetings; heard them read and discussed.

X Q. 53. And you approved the minutes from time to time?

A. Yes, sir.

X Q. 54. And they seemed to you to express what you had agreed upon?

A. They did at that time; yes, sir.

X Q. 55. Now, you are not a railroad builder, are you?

A. We furnished material and everything. We did that ourselves.

X Q. 56. I am speaking of you individually.

A. No, sir; I am not.

X Q. 57. Tell us what your business life has been. I don't mean anything except what you have done in a business way.

A. I have been connected with the Swifts iron and steel works for 16 years—for the last sixteen years.

X Q 58. In what capacity or capacities?

A. First as book-keeper and afterwards as salesman and secretary and director.

X Q. 59. The Swifts iron and steel works make railroad iron?

240 A. They did at that time; yes, sir.

X Q. 60. That is to say, the rails for the tracks?

A. Yes, sir; track material.

X Q. 61. It as a company never constructed a railroad, did it?

A. Never as a company; no, sir.

X Q. 62. You as an individual never constructed a railroad, did you?

A. No, sir. I have sometimes made conditional contracts with railroads that if they would organize in a certain way and get certain subscriptions I would furnish the material on a certain basis.

X Q. 63. That is, you would simply make an arrangement with the men that if they would organize in a certain way, so as to secure your payments to your satisfaction, you would furnish the rails?

A. Yes, sir.

X Q. 64. And that is all there was of it?

A. I have drawn up some articles for them.

X Q. 65. Precisely; but that had nothing to do with the physical construction of the road. You never had anything to do with the physical construction of the road, did you?

A. I didn't never, but I had to satisfy myself that they had the physical road in such a state of forwardness and the materials and the support to build and use these materials that were furnished.

X Q. 66. And you were paid the money?

A. Yes, sir.

X Q. 67. You never superintended the construction of a railroad?

A. No, sir; no, sir.

241 X Q. 68. You never was engaged in the railroad business?

A. No, sir.

X Q. 69. You never bought or sold a railroad yourself?

A. I don't know whether I ever done it or not. I cannot remember now.

X Q. 70. Now state what one, if you ever did.

A. I am just trying to think whether I did or not. I cannot recollect now. No; I don't remember that I ever bought or sold.

X Q. 71. You don't know how much grading was done on this road up here, do you?

A. On which road?

X Q. 72. The road in question.

A. I only know from going over the road as a man could see going over the road on a construction train.

X Q. 73. Could you tell how much the grading cost per mile at any place?

A. I could by going over the road. That took fifteen hundred, twelve hundred, and four thousand dollars per mile, according to

the character of the road, and from that estimate of what they would have to pay for the rails and the character of the subscription would also be taken into consideration.

X Q. 74. Do you know how many bridges there are on this road?

A. I don't recollect. I know there are quite a number of little ones. There is a large one at Port William.

242 X Q. 75. Do you know the length of the road?

A. Do you mean at present?

X Q. 76. Yes, sir; the present length.

A. I don't know the exact length. It is some twenty-eight miles, I believe.

X Q. 77. Do you know what its length was before Mr. Harper did anything to extend it?

A. Do you mean completing it—the road?

X Q. 78. Yes, sir.

A. I think 24 miles were built originally.

X Q. 79. And then he built four miles in the way of an extension?

A. Yes, sir.

X Q. 80. Now, what counties does this road run into and through? It runs into 2 counties, does it not?

A. Fayette, Greene, and Clinton. It is located in these 3 counties.

X Q. 81. And in Warren?

A. I don't believe it runs into Warren county, but only in Fayette, Greene, and Clinton.

X Q. 82. Is that not a flat country up there?

A. Part of it is and part of it is rolling.

X Q. 83. You don't know of your own knowledge what that road cost before Mr. Harper or your company had any connection with it. I mean, now, of your own knowledge, do you?

A. Only by seeing part of the books. I saw the books and talked with the contractors.

X Q. 84. You observe I am asking you if you know of your

243 own knowledge.

A. No; I could not know excepting through other parties.

X Q. 85. Mr. Pfau, do you know what the earning power of that road is to-day?

A. I do not.

X Q. 86. Did you know what its earning power was in 1881?

A. I did not.

X Q. 87. In 1882?

A. No, sir.

X Q. 88. In 1883 or 1884?

A. Our business was settled with them; I could not say, or about before that.

X Q. 89. Did you ever know its running power?

A. No, sir; not taking a whole year in.

X Q. 90. Can you tell what it earned during any one year while you were a director?

A. No, sir.

X Q. 90. Did it ever earn more than the current expenses or as

much as the current expenses? If so, during what period of time was it?

A. I cannot say; I cannot say, because the connections contemplated were never completed.

X Q. 92. Mr. Pfau, you have not attempted to give or do you ever feel able to give an opinion as to the value of that road in 1881 just as it stood without connections now?

A. You mean after it was completed?

X Q. 93. Yes; take it as it was completed.

244 A. The value of it?

X Q. 94. Yes, sir.

A. That would depend upon who had hold of it.

X Q. 95. No, no; I am asking you whether you can state its value in money and its earning power. You stated that, with your reason for stating it, in 1881 or 1882.

A. The value of the property in hand that could properly manage it might be all the way from five hundred thousand dollars to a million. It might not be more than three hundred thousand dollars. It depends upon its management.

X Q. 96. You don't really know what its value was then, do you?

A. In 1881?

X Q. 98. Yes, sir.

A. Well, I considered it worth a great deal of money if he purchased in connection with it——

X Q. 99. No, no; I am speaking of it as a railroad. That is what I am asking about.

A. That is the part upon which its value depended. If you simply expected to run it for all time—simply to carry the people right along the road without connecting termini at other places—of course it could not produce a large income.

X Q. 100. Take it right through the country between its present termini, is it possible, now, in your judgment, that that road could pay running expenses?

245 A. I don't consider that they have got it in a business shape.

X Q. 101. Well, I am putting it now to you as it was, as the road was when Mr. Harper completed it. Was that road capable of earning running expenses? I want to get your judgment there on paper.

A. I think it was capable of earning its running expenses.

X Q. 102. Don't you know that it never did it?

A. It did it for a time there; some one of the officers told me so.

X Q. 103. Now, what time was that, and what officer told you?

A. Mr. Gimperling told me at one time that he was earning it.

X Q. 104. Now, at what time?

A. I think it was while he was still acting as assignee of it or receiver.

X Q. 105. It was while it was in the hands of the receiver?

A. Yes, sir.

X Q. 106. Why, don't you know that they had no regular trains,

and on the contrary they could not earn the money to pay for regular trains? Are you not familiar with that?

A. That might be in certain seasons of the year.

X Q. 107. Do you mean to say that you can state its value in 1881 or 1882, just as it stood?

A. I do in 1881, because then it was expected to make connections——

246 X Q. 108. No, no; just as it stood.

A. That was a part of the railroad's value; part of the value of a railroad is its prospective connections and opportunities for business.

X Q. 109. Why, Mr. Pfau, you are talking now about connections between here and Columbus, are you not?

A. Between here and Columbus and here and the Hocking valley.

X Q. 110. Don't you know that there was the Little Miami and the three C.'s and I. running between here and Columbus and the Midland road in prospect?

A. The Midland was not then talked of; but this road would have been nearly twenty miles shorter than the Little Miami road, running through Mt. Sterling and Bowling Green. The Bowling Green people had wanted to make large donations to the road if we would carry it on through to Columbus. I went there for that purpose and met Mr. Arnold and Knicely, of Dayton, in connection with their Stillwater Valley Narrow-Gauge road. Mr. Arnold went to Union to place the bonds.

X Q. 111. Are you stating now what you know of your own knowledge?

The WITNESS: What I am going to say is about Mr. Arnold.

Mr. WARRINGTON: Then I object as counsel for the plaintiff to the witness proceeding with hearsay testimony.

The WITNESS: I believe there was a contract made—a con-
247 ditional contract—for making the connection between this road and this road to Columbus from Stillwater down through Dayton to Columbus. It would largely benefit this road, and it was proposed to exchange some of their bonds for the others, which might have carried the bonds, both income and the others, to par.

Counsel for the complainants object to the last statement of the witness and move to strike it out.

X Q. 112. You have now given the reasons in the answers stated.

A. I have given a portion of the reasons as they occurred to me.

X Q. 113. Is the Swift's iron and steel works making track material now?

A. Not at present.

X Q. 114. How long since have they quit?

A. They have not made any for some time.

X Q. 115. And you are still in its employ?

A. Yes, sir.

X Q. 116. Mr. Pfau, how often have you repeated to any person the conversations which you have recited here to-day?

A. I have never repeated them to anybody.
X Q. 117. Not to any one?
A. No, sir.
X Q. 118. No one knew that you knew them?
A. Sir?
X Q. 119. Did any one know that you knew them?
A. I suppose Mr. Harper might recall these facts. It didn't
248 occur to me until just now—until you asked the question.
X Q. 120. No, no; I am speaking about the conversations between you and these other gentlemen concerning the organization of the company.
A. Oh, we had several conversations before we ever organized, you know.
X Q. 121. How often have you repeated them since they occurred and prior to your coming here?
A. How do you mean?
X Q. 122. Well, have you talked to anybody about them?
A. I have talked to Mr. Jordan about them.
X Q. 123. When?
A. Very recently.
X Q. 124. When?
A. He asked me to-day. He said, "Were you present when these contracts were made between Mr. Harper and the Chicago parties?" and I said, "No."
X Q. 125. So you did talk it over to-day?
A. Yes; he asked me what I knew about the contracts between these parties. I told him what I didn't know and what I did know—that is, in a general way; probably in two or three minutes. (After a pause the witness continues:) I asked him whether it was competent testimony.

Mr. WARRINGTON: There is no question asked.
Mr. JORDAN: You can continue if you desire.
The WITNESS (continuing): I asked him whether it was compe-
tent testimony to repeat the conversation between Mr. Harper
249 and myself. I had doubts whether I could repeat what he wanted me to do and what I said I would do—whether his remarks were competent. I had an idea that they were not competent; that I was not authorized to repeat what another party had said unless it was in the presence of the party affected.
Mr. RIDDLE: What was Judge Jordan's idea about it?
The WITNESS: He said I could state what Mr. Harper told me was the reason why he wanted me to go into the railroad.

250 E. SNOWDEN, of lawful age, called on behalf of the defendant-, being first duly sworn, deposes and says as follows:

Examination by Mr. JORDAN:

Q. 1. You may state your name, age, residence, and occupation.
A. My name is E. Snowden; I am forty years of age, and cashier of E. L. Harper & Co., Cincinnati.

Q. 2. How long have you been connected with Mr. Harper?
A. About 10 years.
Q. 3. Any relation by marriage or otherwise?
A. No, sir.
Q. 4. You may state whether you are one of the subscribers in getting up this new organization.
A. I am.
Q. 5. You may state when it was first stated to you that you were expected to join the organization.
A. I think it was on the first meeting of the stockholders or the preliminary meeting when the stock was subscribed.
Q. 6. When?
A. About the 10th of Dec.
Q. 7. You can state whether you had any conversation with Mr. Harper as to the purpose and what he said in regard to the organization of this road at that time or shortly previous when you were spoken to about going in and joining any organization.

251 Counsel for the complainants object to the question.

A. I don't recollect having any special conversation with Mr. Harper. I knew the matter was talked over in the office and at this first meeting among ourselves.
Q. 8. Do you remember whether Mr. Harper was present?
A. Yes; he was present at the office meeting and he made this proposition to organize.

By Mr. WARRINGTON:

Q. 9. Was it in writing?
A. No; at that time I should think it was a verbal proposition to organize a company, to take bonds, income mortgage bonds, and broaden the gauge of the road, and turn it over to a company in exchange for these securities.

By Mr. JORDAN:

Q. 10. To widen and extend it?
A. Yes; to make final connections, I think.
Q. 11. You say that that conversation was had of a verbal character preliminary to going into the organization?
A. Yes, sir.
Q. 12. You can state what you did in pursuance of it.
A. I think I subscribed for a share of stock. That was at the first meeting, and the meeting after that, I think, was the election of the directors. I was chosen one of the directors.
Q. 13. Then when you were chosen one of the directors you held a meeting, and then did what?

252 A. And the second meeting was held in the office of Harper & Co., and this proposition that Harper made verbally was introduced and made a part of the proceedings.
Q. 14. Reduced to writing?
A. Reduced to writing; yes, sir.
Q. 15. What was done with the paper?

A. A vote was had on it and it was accepted.

Q. 16. Then did the company issue bonds and stock in pursuance of it? What did it do?

A. I suppose securities were issued. I don't know anything about that; I didn't have charge of it.

Q. 17. What connection were you to have with the road any further than that?

A. Simply as a director.

Q. 18. Was there any connection with it that was attempted further than simply the organization with the view of turning over these securities to the company?

Counsel for the complainants objects to the question.

A. Not at all. That was all the connection I had with the road.

Q. 19. Were you to have any other connection than that?

A. No, sir: that was all.

Q. —. Was there anything said in your conversation about having any further connection than that?

A. No, sir.

Q. 21. Was that designated as the limit of your connection with it?

253 A. Yes, sir.

Q. 22. The organization with the view of effecting this arrangement?

A. Yes, sir.

Q. 23. Do you know of any contract that Preston made?

A. No, sir; I don't know anything about it at all.

Q. 24. Did you know anything about Preston or McHenry going up to look at the road?

A. Nothing about that.

(Cross-examination of the witness waived.)

254 JAMES H. MATTHEWS, a witness called on behalf of the defendants, being first duly sworn, deposes and says as follows:

Examination by Mr. JORDAN:

Q. 1. You are a brother-in-law of Mr. Harper's?

A. Yes, sir.

Q. 2. What is your business?

A. I am at present connected with the Swift's iron and steel works.

Q. 3. In what capacity?

A. As treasurer.

Q. 4. What is your age?

A. 28.

Q. 5. You live in Cincinnati?

A. Yes, sir.

Q. 6. What business were you engaged in in 1881, the fall and winter of 1881?

A. With E. L. Harper & Co.

Q. 7. In the same business as now?

A. No, sir.

Q. 8. What was your deparment then?

A. I was in the office as a clerk then.

Q. 9. Do you remember Mr. Harper calling upon you to become a subscriber to the stock of this corporation?

A. Yes, sir.

Q. 10. What did he say to you was the purpose and object of that organization?

Counsel for the complainants object to the question.

255 A. I understood from him in a general way that he had an object in making a company of this road; that he owned individually for the purpose of transferring securities, I think it was.

Q. 11. Transferring securities to him?

A. To others. I didn't know particularly at the time who they were, but I knew that that was the object of it. He stated that to me.

Q. 12. Subsequently did he request you to identify this with the organization?

A. Only so far as to get the road into a proper shape until he could dispose of the bonds and stock.

Q. 13. You can state whether anything was said by Mr. Harper prior to your becoming a subscriber for the stock about what his arrangement was or would be with the corporation when organized as to what he was to do.

A. I understood when I subscribed for one share of the stock there was nothing for me to put in; that he would assume all the expenses of it. It was not to cost me anything. It was only for the purpose that I stated before.

Q. 14. To obtain securities so he could transfer them?

A. No, sir; the same.

Q. 15. Do you remember of his saying anything as to what he was to receive and what he was to do with the road, how he was to create the securities?

Counsel for the complainants object to the question.

256 A. He was to extend the road, broaden the gauge, make connection at Claysville Junction and Jeffersonville, and was to take the bonds and the securities of the road for his pay.

Q. 16. Bonds simply?

A. Bonds and stock for his pay.

Q. 17. I will ask you whether that was talked of before you went into the organization.

A. Yes; I knew of it.

Q. 18. And you knew of it before you went into the organization?

Counsel for the complainants object to the question both as to form and substance.

A. Yes, sir.

Q. 19. And then what occurred after you did go into it?

A. I believe the contract was complied with, that he was — broaden the gauge and extend the road.

Q. 20. Did he make a proposition to buy when organized?

A. He made a proposition to the stockholders and subscribers verbally at first. It was afterward put in writing.

Q. 21. Is that your recollection about it.

A. That is my recollection about it.

Q. 22. Was that proposition accepted?

A. Yes, sir.

Q. 23. Do you know anything about Preston or McHenry having seen the road?

A. No, sir.

Q. 23. Do you know anything about Preston or McHenry
257 having seen the road?

A. No, sir.

Q. 24. Did you know the nature of the contract that Mr. Harper had with Preston, McHenry, and others? Do you know what that was?

A. I don't know the nature of it. I knew that there was something between them, and that this was the object.

Q. 25. What was the object?

Counsel for the complainants object to the question.

A. The getting the road—the securities of the road; the road was to consum-ate that.

Q. 26. State whether you knew of any of these gentlemen having gone up to see the road.

A. No, sir; I did not.

Q. 28. What was the object as expressed by Mr. Harper in the construction and organization of this road?

Counsel for the complainants object to the question.

A. That he was to get the road into the shape of a company rather than as his individual property, so that——

Counsel for the complainants object to the further answering of the witness.

Mr. JORDAN: So that he could do what?

The WITNESS: So that he could issue bonds and stock on the road, so that they could be transferred to carry out his contract with these parties.

258 Cross-examination by Mr. WARRINGTON:

X Q. 29. You are Mr. Harper's brother-in-law?

A. Yes, sir.

D. P. HYATT, a witness called on behalf of the defendants, being first duly sworn, deposes and says as follows:

Examination by Mr. JORDAN:

Q. 1. State your name, age, residence, and occupation.

A. I am 39 years old; I reside in Cincinnati; my occupation at the present time is that of a book-keeper.

Q. 2. For whom?

A. E. L. Harper & Co.

Q. 3. What was it in the fall of 1881?

A. I think it was the same occupation at that time. I was also assisting in the correspondence, I believe.

By Mr. WARRINGTON:

Q. 4. You have been right along with Mr. Harper ever since?

A. Yes, sir.

By Mr. JORDAN:

Q. 6. Are you any relation to him?

A. I am a brother-in-law.

Q. 7. Now, were you one of the directors of the Cincinnati, Columbus and Hocking Valley R. R. Company?

259 A. Yes, sir.

Q. 8. And subsequently became president thereof?

A. Yes, sir.

Q. 9. You can state who first called your attention to the organization of that company.

A. Mr. Pfau, I believe, called my attention to it first. I was passing along the street—3rd street—going to the post office, and he spoke to me on the way and said that Mr. Harper——

Q. 10. You need not state that. When was it your attention was first called to it—about when?

A. Well, it was along about the 10th or 12th of Dec., 1881.

Q. 11. Did you have any talk with Mr. Harper about it?

A. I had none.

Q. 12. Did you have any conversation with him with reference to it before you went into the organization?

A. No, sir.

Q. 13. Did you attend any meetings that were prospecting about this road?

A. There was a meeting along about that time that I speak of—the day on which Mr. Pfay met me in Jenney's office. He called me there at that time as a request by Mr. Harper that I should come.

Q. 14. Now, at that meeting at Mr. Jenny's office do you recollect the day you met there?

A. Do you mean the day of the week?

Q. 16. The day of the month.

260 A. No, sir; I could not say positively.

Q. 16. I will ask you whether it was the day the subscriptions were made by these persons with the view of becoming directors.

A. Yes, sir.

Q. 17. Mr. Harper was there?

A. He was.

Q. 18. I will ask you whether anything was said by Mr. Harper

to them as you were assembled in regard to his construction of this road, its sale to the corporation, and what he was to receive in return.

Counsel for the complainants object to the question.

A. He did.

Q. 19. State what he said.

Counsel for the complainants object to the question.

A. Verbally; he was speaking of this road; that he owned and wished to form a company and issue first-mortgage bonds and income bonds and stock. He had a certain purpose in view which I don't recollect now; not that he said anything about — other than to further the organization of this road?

Q. 20. Did he say anything in that conversation as to what he proposed to do before he conveyed it to the company—what he proposed to do with the road?

Counsel for the complainants object to the question.

A. Yes, sir.

Q. 21. What?

261 A. He proposed to lengthen the road, widen the gauge, and put it in running order.

Q. 22. And then what was he to do with it?

A. To turn it over to the company.

Q. 23. You can state now whether you subsequently had a meeting of the stockholders with the view of an election of directors.

A. We did have.

Q. 24. I will ask you if he wanted to make any statement as to what the contract with the road was to be—a verbal statement.

Counsel for the complainants object to the question.

(Question continued:) That is, what he was getting for turning over the road?

Counsel for the complainants make the same objection.

A. Yes, sir.

Q. 25. Go on and state it.

A. He made a proposition to the road——

Q. 26. I am speaking now of the verbal one when you were all met to make the subscriptions.

A. His statement was that he had this piece of road on his hand-, so. This is the substance of it—that he had this road on his hands and he wished to organize the company, and he proposed to the stockholders to lengthen the road, widen the gauge, and to take for the pay of the thing the first-mortgage bonds, the income bonds, and the stock, I believe.

262 Q. 27. Do you remember of his making at that time, in connection with the rest of the board, a preliminary subscription or sign a book at that time?

A. At that time?

Q. 28. Yes, sir.

A. I can't say whether he did sign it himself at that time or not, because I was a little late and there were some signatures on the book already at that time.

Q. 29. Did you sign the book on that day?

A. Yes; I did.

Q. 30. Now state what occurred after that; after you had this book of stockholders subsequent thereto—what was done.

Counsel for the complainants object to the question.

A. The meeting was called to order.

Q. 31. Did you have a subsequent meeting?

A. We had a subsequent meeting.

Q. 32. Do you recollect the date of that subsequent meeting?

A. Well, no; I don't. I think, though, it was on the 13th of Dec.—I think it was.

Q. 33. Now, what took place on that date?

Counsel for the complainants object to the question.

A. Nothing more than repeated over the proposition that Mr. Harper had made, but I think it had been reduced to writing
263 at that time, and it was read and accepted by the board.

Counsel for the complainants except to the answer and move to strike it out.

Q. 34. Did you know that he had a contract with President McHenry and others, and that they were eventually to have a portion of the bonds of the road at that time?

A. No, sir; I did not.

Q. 35. Did you know Preston or McHenry?

A. No, sir.

Q. 36. Have you any recollection yourself of seeing them about the establishment?

A. No, sir.

Q. 37. The room that you occupy, is it the east or west room—that is, are you with the Swifts iron and steel works or with E. L. Harper & Co.?

A. With E. L. Harper & Co.

Q. 38. That is the one that is west of the Swifts iron and steel works?

A. Yes, sir.

Q. 39. Harper's place of business, where was it principally?

A. At #26.

Q. 40. I mean what was the business, the department of his business?

A. Where was he?

Q. 41. Yes; where was he located—E. L. Harper—there with you or in Swift's iron and steel works or both?

264 A. He was located in the Swifts iron and steel works.

Q. 42. That is the place where he transacted his business?

A. Generally.

Q. 43. So that it would not be natural for you to come in contact with these men if they were here?

A. No, sir.

Cross-examination by Mr. WARRINGTON:

X Q. 44. So far as you know, whatever Harper there desired done was done in his interest and for his benefit, was it, and at his request?

A. Well, that I didn't understand directly so at the time of the organization—that he wanted us to unite. I don't know whether it was for his personal benefit or not.

X Q. 45. You had no interest in it?

A. No.

X Q. 46. He was to take care of your subscription—relieve you of any responsibility?

A. Yes, sir; that was my understanding.

X Q. 47. That was so as to all of the directors, as far as you know?

A. Yes, sir.

X Q. 48. He was looking after all those subscriptions?

A. As I understood.

X Q. 49. As well as looking after his own?

A. Yes, sir.

265 X Q. 50. You made no investigation—that is, you didn't examine the road—before you agreed to become one of the directors to buy it, did you?

A. No, sir.

X Q. 51. You never had seen it?

A. No, sir.

X Q. 52. You didn't know what it was worth?

A. No, sir.

X Q. 53. You didn't know whether you were giving too much or too little for it?

A. No, sir.

X Q. 54. That was so as to the other directors, so far as you know, was it not?

A. I presume so.

X Q. 55. What was stated there was reduced to writing, was it not?

A. Yes, sir.

X Q. 56. And what was intended to be done?

A. Yes, sir.

X Q. 57. That writing is in the minutes?

A. I believe it is.

Redirect examination by Mr. JORDAN:

Q. 58. Do you remember whether the writing expresses any fact different from what was understood at the time of the meeting, on the 10th of Dec., at Mr. Jenny's office?

A. I don't think it does.

266 MONDAY, *October 26th*, 1885.

Met pursuant to adjournment at the office of Messrs. Jordan & Jordans.

Present: Messrs. Riddle and Boyd, for the complainants, and Messrs. Jordan & Jordan, for the defendants.

The witness, ALBERT P. GAHR, being recalled for further direct examination.

Examination by Mr. RIDDLE:

Q. 1. I understand you to say on Saturday in your testimony that you never had discussed or talked over the conversation which you related in your testimony on that day as having occurred between E. L. Harper and Preston and McHenry and others until you told it upon this stand?

A. Yes, sir.

Q. 2. Is that so?

A. My answer is yes.

Q. 3. That you never had consulted with the counsel of Harper in this case?

A. Before I was called, you know, to testify.

Q. 4. Well, I understand you, in your testimony, that you didn't ever recite or relate what you knew to counsel in this case?

A. Perhaps I misunderstood the question, Mr. Riddle.

Q. 5. Did you so state then?

A. On Saturday?

Q. 6. Yes.

A. I might, perhaps, have said that through a misunderstanding of the question.

Q. 7. Had you read the testimony taken in this case be-
267 fore you were called upon the stand?

A. I read all the testimony over—about all of it.

Q. 8. Had you not talked it over with Mr. Harper?

A. No, sir.

Q. 9. Not mentioned it to Mr. Harper?

A. I was away when the testimony of Mr. Harper was taken. When I returned Mr. Harper told me I was wanted by Mr. Jordan in reference to this contract. Consequently, I asked him what the date was and I came up here Saturday morning.

Q. 10. You never had talked to him about your evidence?

A. No, sir; never discussed the question with him at all.

Q. 11. Who gave you the testimony to read over?

A. I think it was in the office.

Q. 12. Who gave it to you?

A. You mean by the testimony——

Q. 13. I mean the testimony in this case which you read over?

A. I got the testimony from these gentlemen. That is my impression—my recollection. Yes; I got the testimony myself here.

Q. 15. From Judge Jordan?

A. Yes; I got it from the Jordans. I am positive about it.

Q. 16. Had you not talked with Mr. Pfau about your testimony in this case?

A. No, sir.

Q. 17. Nor with any one else?

268 A. No, sir; with the exception of the dates. I was absent the entire time the case was in progress.

Q. 18. I mean at any time.

A. I think not.

Q. 19. You know what Mr. Harper had sworn to in his testimony?

A. I have read every person's who has testified; read all -he testimony in this case from the very inception.

Q. 20. And you read it before you went upon the stand?

A. Yes; I did.

269 WILLIAM H. HARPER, of lawful age, called on behalf of the defendants, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testifies as follows:

Examination by Judge JORDAN:

Q. 1. State your name, age, residence, and occupation.

A. My name is William H. Harper; age, 34; residence, Covington, Ky.; and my business is pig-iron commission.

Q. 2. You are a brother of E. L. Harper?

A. Yes, sir.

Q. 3. Identified with him in business?

A. Yes, sir.

Q. 4. In what way?

A. Partner.

Q. 5. In the firm of E. L. Harper & Co.?

A. Yes, sir.

Q. 6. In what way were you identified with him, if at all, in the fall of 1881?

A. As a partner with him as to-day.

Q. 7. You can state whether you saw Preston, McHenry, and any other parties to this contract, about which we have been talking, in Cincinnati.

A. Yes, sir.

Q. 8. Along about the fall of 1881?

A. Yes, sir.

Q. 9. Who did you see here?

A. I saw Preston, McHenry, and Wilshire.

270 Q. 10. You can state whether you saw Preston at any particular time when the subject-matter of this contract was under consideration between E. L. Harper and Preston and McHenry *et al.*

A. Yes; I was present at all the preliminaries of the contract.

Q. 11. Where did that take place?

A. In the back office of the Swift's iron and steel works.

Q. 12. That is the room on the east of the room?

A. That is the east office—back.

Q. 13. Was the office of Mr. Harper then constructed as it is now?
A. No, sir.
Q. 14. What change has been made?
A. He has made a private office since that time; before that there was a partition running right through the office, cutting off the front from the rear entirely.
Q. 15. You may state what was said in substance between E. L. Harper and Preston and McHenry *et al.* in their conversation about the mode or adjustment of the controversy between him and them touching their Chicago dealings.

Counsel for the complainants object to the question both in form and substance.

271 A. Do you want me to state the conversation all through?
Q. 16. Yes. Just give the history of it and substance touching the settlement of that matter.
A. My brother came to me in the office of E. L. Harper & Co. and said, "I would like you to come in as a witness. Preston and McHenry are here with Mr. Wilshire in my back office"—that is, the office of Swift's iron and steel w'ks. I went into the back office with my brother. I was introduced to Mr. Preston, McHenry, and, I think, Mr. Wilshire—I don't remember whether I was or not. Preston wanted my brother to give him some stock in the Swift's iron and steel works in part payment for a claim he had against my brother. My brother said that he could not give him the Swift's iron and steel works stock on the claim, but he had a little railroad up in the country here. He explained where it was and said, "I will issue bonds on that railroad and stock and also income bonds at the rate of $20,000 a mile, first mortgage. I am not positive whether it was ten apiece for them for income stock, but I will give you a third each for your pretended claim. I don't claim that I owe you a cent, he said. Mr. Preston says, Mr. Harper, how long will you leave that open? I will leave it open until you leave your chair, my brother said. Give me time to go up and see the road, Mr. Preston said. All right, said my brother. What time does the train
272 go, Preston says. Well, they looked up the time the trains left. I think that Preston and McHenry bowed themselves out and came back. I am not positive whether the next morning or the second morning my brother came into the office of E. L. Harper & Co. and says, I want you a minute in the other office. When I went in there in the rear office I seen that Preston and McHenry were in the front office. He called them into the rear, where I was. Preston says, Mr. Harper, we were up to look at the road. I don't like a narrow-gauge road. I tell you what we will do, though. If you will broaden the gauge and extend it at both ends we will accept your proposition. No, my brother says. In that case I will issue twenty thousand first-mortgage bonds, twenty thousand income bonds, twenty thousand of stock, at the rate of twenty thousand each a mile, and I will pay you one-third cash. Well, Mr. Harper, Mr. Preston says, we would prefer to take no stock. There might be some liability in the running of the road, and I prefer to

take the first-mortgage bonds. Well, my brother says, if you won't take any stock I will give you one hundred per cent. first-mortgage bonds and fifty per cent. second-income or income bonds. Mr. Preston says, Mr. Harper, how do you propose to tender us these? I propose to organize a company—a stock company—my brother says; deed the road over to a stock company, and take all the collaterals for broadening and extending the road and connecting the road at each end. How long will it take you to do this, Mr. Pres-
273 ton says. How soon do you want me to do it? We would like to have it done in sixty days, if you can. Oh, I cannot do it that soon. I can do it in 4 months. Do you think you can do it in 4 months? All that work—organize and everything? Yes, my brother says. Well, he says, we will accept your proposition, but I want time to talk with my lawyer. That is all I can remember at the present time that occurred then.

Counsel for the complainants move to strike out the answer of the witness, and especially that part which relates to the conversations had *be* between witness and his brother, E. L. Harper, when no one else was present.

Q. 17. State the language, as near as you can, that was made use of by Mr. Harper when he spoke of organizing a road, and what that arrangement was as he stated it and the organization to create these securities.

Counsel for the complainants object to the question both as to form and substance.

A. I propose to organize the road, deed it over to them after the gauge is broadened and connect it at both ends from the collateral of the road.

Counsel for the complainants move to strike out the answer.

Q. 18. Deed it over to whom? Did he state to whom he was to deed it?

A. To the company.

274 Q. 19. Did he state anything as to what he was to do with the collaterals or securities?

A. He was to receive them and then fulfil his contract with Preston and McHenry.

Counsel for the complainants move to strike out the last question and answer.

Q. 20. Now, you may state whether you were one of the subscribers in that book.

A. Yes; I believe I signed for a share.

Q. 21. State where that was done; where it was that you met.

A. It was in Perry and Jenney's office.

Q. 22. Now, at the time that was done, what was said and done in that connection?

Counsel for the complainants object to the question.

A. There was nothing; only the organization.

Q. 23. Well, I am speaking about the organization and about the conveyance of the road to the company and issuing the securities.

Counsel for the complainants object to the coaching of the witness. I want the protest to be taken down against the constant efforts to suggest to the witness's mind the substance of his answers.

Mr. JORDAN: Now, proceed and state fully what was said upon the subject and the proposed organization of the road at that time.

Counsel for the complainants object to the question.

275 A. The matter was talked over between him, my brother, and myself about the organization in pursuance of carrying out this contract with Preston and McHenry and no other.

Q. 24. Was that talked over between you and your brother at that meeting?

A. Yes.

Counsel for the complainants object to the previous question and answer.

Q. 25. You may state what was said about the subscription that was made to the capital stock, if you know, on that occasion.

A. My brother told me it was only a mere authority to carry out the contract.

Counsel for the complainants object to the last question and answer.

Q. 26. Was that stated publicly to that meeting?

A. I think it was.

Q. 27. Was there anything said on that occasion about conveying the road to a company and what he was to have in return for it?

Counsel for the complainant- object to the question.

A. Yes, sir.

Q. 28. What was it?

A. He was to have all the first-income bonds and stock and *he* deed the road over to the company.

Counsel for the compl't- move to strike out the answer.

276 Q. 29. When you speak of first what do you mean by first?

A. 1st-mortgage bonds.

Q. 30. That is, income bonds and stock?

A. Yes, sir.

Q. 31. And you say that was talked over at that meeting?

A. Yes, sir.

Q. 32. You may state now whether the certificate was obtained from the secretary of state—the certificate of incorporation of this new company.

Counsel for the complainants object to the question.

A. Yes, sir.

Q. 33. State whether you met as stockholders; and, if so, what was done at your first meeting.

Counsel for the complainants object to the question.

A. Yes; we met as stockholders, and everything was done, as I remember, to complete a legal organization.

Q. 34. Were you elected one of the directors?

Counsel for the complainants object to the question.

A. Yes, sir.

Q. 35. At that meeting—did you have a meeting of the directors then?

Counsel for the complainants object to the question.

A. Yes.

Q. 36. What was done at the meeting?

Counsel for the complainants object to the question.

Question modified as follows:

277 Was there any proposition made by Mr. Harper?

A. Yes, sir; there was a proposition made, the same as I stated before, that he would deed the road over to them and take in consideration all of the first mortgage, income, and stock of the road.

Counsel for the complainants move to strike out the last answer.

Q. 37. Now, you may state whether you remember of the occasion that the bonds were delivered to Preston and McHenry. Do you know anything about that?

A. No, sir; I was not present.

Q. 38. Do you know anything about their having gone up to see the road after it was extended and widened and before they accepted it?

Counsel for the complainants object to the question.

A. No, sir.

Mr. JORDAN: He says he does not recollect.

Cross-examination by Mr. RIDDLE:

X Q. 39. You say that you were present as a witness at the request of your brother during the conversation between your brother and Preston, McHenry, and Wilshire in the early part of October, 1881, which lead up to the written agreement of October 12, 1881?

A. Yes, sir.

X Q. 40. That you were in his back office?

A. Of the Swifts iron and steel works.

278 X Q. 41. Of the Swifts iron and steel works, where a desk of your brother's was located?

A. No; it was a scrap desk. My brother's desk was in the front office.

X Q. 42. Were you at that place during the whole of that conversation?

A. Yes, sir.

X Q. 43. You were not running in sometimes and out sometimes?

A. No, sir; I staid until Preston, McHenry, and Wilshire left.

X Q. 44. Was that the only conversation that was ever had touching the substance of that contract?

A. Yes, sir; in my presence.

X Q. 45. Might they not have had other conversations at which you were not present? How do you know they had no other conversations or meetings with Harper at times when you were not present?

A. My brother told me that he wanted me to be present at all the conversations—until the thing was fixed up.

X Q. 46. That is the only way that you know, is it?

A. Yes, sir.

X Q. 46½. Then of your own knowledge you don't know whether there was any other conversation or not between these parties except what your brother told you?

A. That is all.

X Q. 47. You say also, Mr. Harper, that you had some conversations with your brother at the time that you met at Perry &
279 Jenney's office to promote the organization of the Cincinnati, Columbus and Hocking Valley Railway Co. Now, was the conversation between yourself and your brother had at that time with reference to carrying out this written contract of October 12, 1881?

A. Yes, sir.

X Q. 48. And for that purpose alone?

A. Yes, sir.

X Q. 49. And with reference to carrying out that particular contract?

A. Yes, sir.

Redirect examination by Judge JORDAN:

X Q. 50. Do you mean to say that it was not possible that your brother might have had a conversation in your absence?

A. I think I answered that *conversation.*

Q. 51. You may have done so; still, answer it now—whether it is not possible that he might have had a conversation outside.

A. I was watching him very closely at that time, because I didn't like the contract with Preston & McHenry. I would not recognize the contract.

Q. 52. Still, they might have had a conversation when you were not present.

A. I think it was doubtful.

280 It is admitted by counsel for the defendants that Mr. Harper did execute a deed to the railroad company in pursuance of the contract, and that the same may be offered in evidence as part of this deposition—the original deed of conveyance or a cer-

tified copy thereof—and that the complainants may offer a certified copy of the mortgage or a copy of the bond upon which the several judgments are based.

Counsel for the defendants say that they will reserve the right to produce Joseph W. Wilshire as a witness on their behalf on the morning of October 27, and counsel for Mr. Harper will claim further time to take testimony.

Mr. RIDDLE: Counsel for the complainants will proceed to-morrow morning, at 11 o'clock, to take their rebutting testimony, or as soon thereafter on that day as the counsel for the defendants are through with Mr. Wilshire or, if several, they have no other witness to produce.

281 OCTOBER 27TH, 1885.

Counsel met at the office of the commissioner, # 17½ West 3rd St., at 10.20 o'clock a. m. for the purpose of the further taking of these depositions.

Whereupon the following proceedings were had:

E. L. Harper, by his counsel, Judge J. A. Jordan, who is present at said office, protests to the going into rebutting testimony, or that the complainants should do so, and states that the defendant E. L. Harper has not had sufficient time to complete the taking of his testimony; that during the 20 days allowed for the taking of the testimony a great portion of the time was necessarily occupied by his counsel in the trial of a case which rendered it impossible that he should occupy such time as was necessary for its development; that the 20 days are entirely *two* short a time; that in consequence of the absence of the judges of the circuit court it has not been in his power to make application for further time since the necessity has been made apparent; that in order that the testimony might be *then* it has been taken in short-hand, and that the stenographers have not had time to copy the same so as to enable the counsel for the defendants to review or examine said testimony that they have desired yet to take, some of which is absent from the city and from the county, and that the magnitude of which testimony that has been offered by the defendants has only been made apparent
282 from time to time as the testimony developed itself, and that it is only now for the first time that much testimony to be offered by the defendant- is brought to light, and that what further testimony is brought to light by a further examination of the testimony when ist is fully and carefully examined they are not able to say.

They therefore ask for a postponement of the examination to enable the defendants' counsel to consider and make application to the court for further time; that while it is true that Mr. Wilshire is in the city, and that it has been in contemplation to examine him, counsel for Mr. Harper have not had sufficient time to confer with reference to the adviseability of doing so, and therefore they have no further testimony to offer themselves now, and if the complainants proceed with rebutting testimony it is done under protest.

Mr. RIDDLE: Mr. Boyd and Mr. Riddle, of counsel for the complainants in this case, by way of replication to the protest of the Hon. J. A. Jordan, one of the counsel for the defendants, say that this case was referred to the commissioner to take testimony on the 13th day of June, 1885; that in due course of time the complainants proceeded with their testimony-in-chief, and concluded the
283 taking of the same Sept. 14, 1885; that the defendants offered no evidence on their part until after the 5th day of October, 1885; that pursuant to the notice duly served upon counsel for the defendants requiring proofs in this case to be closed the court entered an order on the 5th day of October, A. D. 1885, by which the defendants, at the request of their counsel, were allowed 20 days additional time to complete their testimony; that having notified counsel for the complainants that they would proceed to take testimony for the defense on the 15th day of October, 1885, they didn't begin the taking of any testimony until the 16th day of October, 1885; that at the close of that day the taking of the testimony was postponed at the request of defendants or their counsel until Saturday, the 24th day of October, 1885, and at the close of that day it was agreed that the defendants should have Monday, the 26th of October, in which to take further testimony, and that by further agreement on the 26th of October between the counsel it was agreed that the defendants might call Joseph W. Wilshire as a witness for the defense on Tuesday, the 27th day of October.

Counsel further state that the complainants have at all times been ready to proceed at any time with any evidence obtained in this case; that the complainants are all non-residents and are
284 under great expense, both on account of the loss of their time and the expense of counsel coming to Cincinnati for the purpose of taking testimony; that some of the complainants are here now and ready to proceed with their testimony in rebuttal; that the defense have not proposed to pay or discharge any part of the cost already accrued in this case, and the counsel further insists that the defendants have no right either under general rules governing the practice in the United States circuit court or by the special rule requiring the defendants in this case to complete their testimony within 20 days from the 5th day of October, 1885, but ask the complainants for further time or to object to their proceeding with their rebutting testimony.

Judge J. A. Jordan, by way of rebutter, says that it was mearly a statement on the part of the complainants' counsel that Wilshire's testimony might be taken on Monday, and that at the time the consent was given said Jordan claimed that nothing in such consent should be implied as a waiver of his right to demand further time.

285 E. L. HARPER recalled by Mr. RIDDLE for further cross-examination:

Q. 1. You will recollect, Mr. Harper, that I asked you, when you were upon the stand a week ago last Friday, if you had any vouchers, receipts, or evidences showing the payment by you of $195,000

on account of the purchase, widening the gauge, and extending the Cin., Col. & H. V. railroad in pursuance of your contract of October 12, 1881.

A. As I stated then, I kept no private books.

Q. 2. I will ask you if you recollect that I asked you this question.

A. Yes, sir.

Q. 3. And you said you would examine and see if you had any such vouchers, did you not?

A. Yes, sir.

Q. 4. Have you ascertained whether you have vouchers showing the payment of any money or not and to whom it was paid and how much was paid in fact?

A. I have looked up the matter and find a stub check book which is incomplete. I find a memorandum in the book of March 3rd, 1880, "J. Gimperling, $5,000."

Q. 5. What was that for?

A. I don't know.

Q. 6. You don't know whether it was on account of that road or not?

286 A. Yes; it was on account. All the money was on account, making $50,000 in all. That is all the memorandum I have about that. The Swifts iron & steel works is $25,089.81.

Q. 7. What is that for?

A. That is for iron bought of them.

Q. 8. What evidence have you of that twenty-five thousand and odd dollars?

A. We have an account on the books.

Q. 9. Just an account on the books?

A. Yes, sir; showing the charges.

Q. 10. And the books you decline to produce until required by the court?

A. I will produce them if required by the court.

Judge JORDAN: And will produce now a copy?

The WITNESS: Yes; I will give a copy of the account.

Q. 11. What else have you there, Mr. Harper?

A. Now, the narrow-gauge road about 20 miles. I find that the cost, which I stated the other day was $65,000, was $66,281.66 cash.

Q. 12. What evidence have you of that, Mr. Harper?

A. I have the final draft for the final payment, $36,281.66, when there had already been $30,000 cash paid.

Q. 13. Did that include any interest?

A. Yes; I suppose it did; $12,081.66; that is my impression.

Q. 14. And this is the only memoranda you have showing payment on account of that road?

A. That is all I could put my hands on.

287 Q. 15. I understand you to say that you turned over the bonds in pursuance of your written contract of October 12th 1881, to Preston and McHenry—turned bonds over to them on the

11th day of Feb., 1882. How do you know that you turned the bonds over—delivered the bonds on that day?

A. The receipt shows. That is all I know.

Q. 16. Is the receipt the only evidence you have of the fact that it was on that day that you made the delivery?

A. Yes, sir.

Q. 17. When did you get the bonds, Mr. Harper, from the railroad company, about when?

A. Well, I don't recollect, but a very few days before that matter; part of them, enough to pay them.

Q. 18. Were they all delivered to you from the officers of the railroad company before you delivered any of them to Preston and McHenry?

A. No; I think not, sir.

Q. 19. When were they delivered?

A. Why, after the road was constructed.

Q. 20. All of them?

A. Yes, sir.

Q. 21. The whole 600,000 called for by your contract of sale?

A. No, sir; the $20,000 a mile. It only figured out 560,000.

Q. 22. 560,000 1st mortgages?

A. 560,000 of the 1st mortgages.

Q. 23. And the same amount of the income bonds?

288 A. Yes.

Q. 24. And the stock, when was that delivered to you?

A. It never has been.

Q. 25. None of it?

A. No, sir.

Redirect examination by Judge JORDAN:

Q. 26. With relation and reference to this office where this examination now proceeds, where is your office and place of business and the books of the Swifts iron and steel works, which you have made accessible to those gentlemen who are now inquisitive about them?

A. Right across the street. I would be very glad to show them the books if they would step over.

Q. 27. You have produced a stub check showing $30,000 of payment in the construction and widening and extending of this road; you have also made the statement that your books show about 25,000 more which you paid to the Swifts iron and steel work-. You say that these are all that you can place your hands upon excepting the 36,000 and some odd dollars——

WITNESS: Except $66,000.

Judge JORDAN, continuing: Excepting the $36,000 check which you produced here. State whether you know whether other payments were made.

289 A. Yes, sir; I know other payments were made.

Q. 28. In large amounts?

Counsel for the complainants object to the question.

A. Yes, sir; large amounts.

Q. 29. Have you made search for the other vouchers or exhibits with reference to producing them here and have you been able to find them?

A. I have not been able to find the vouchers, but I know there are considerable large payments in addition to those I have just called.

Q. 30. Were made by you, do I understand?

A. Yes, sir.

Recross-examination by Mr. RIDDLE:

Q. 31. How much was it that you said you paid to Mr. Gimperling—that last check and produced the check book for?

A. That dated $50,000, but I have in my mind that I spent up *up* there the sum of $30,000 more than that.

Q. 32. You have produced all the evidences that you have expended of money that you can find?

A. Yes, sir.

Q. 33. Where is Mr. Gimperling.

A. I don't know; he lives in Dayton, Ohio.

Q. 34. Mr. Harper, I beg pardon. What I want to ask about — another matter. You stated in your testimony, I believe, at
290 the time Mr. Jenny told you you would have to subscribe to the capital stock of this company the ten per cent. of it—you stated that you then made an agreement with your co-operators with the other subscribers to the capital stock that you were to have all the capital stock of the company, including the subscriptions that had already been made, together with the first and second mortgage bonds of the road in payment for the transfer by you of that property to the Cincinnati, Columbus and Hocking Valley Railway Co., did you not?

A. The agreement was made at that time, only carrying out what had previously been agreed upon, before any subscriptions were made.

Q. 35. With these subscribers?

A. Yes, sir.

Q. 36. Was that the agreement made with reference to this written contract of October 12th, 1882?

A. Yes, sir.

Q. 37. Was the agreement for that purpose?

A. For that purpose.

Q. 38. For carrying out the terms of that contract?

A. Yes, sir.

Q. 39. You are certain about that?

A. I know it. I didn't have any other thing in view.

Q. 40. There was nothing else except that particular contract in view between you?

291 A. Nothing in the world. I in fact settled with these gentlemen for much less than it cost me to build it—for $150,000

less than it cost me to build the road. I don't owe them one nickel.

Q. 42. Did you ever talk with Mr. Gahr about his testimony in this case before he went on the witness-stand?

A. No, sir; I never did.

Q. 43. Never in your life?

A. I never did. I never said a word to him about his testimony. I knew he heard the testimony—the conversation contract between Preston and myself—because he was present and wrote the contract. I spoke to Mr. Jordan about his overhearing the conversation.

Q. 44. Did you ask him to read the testimony over contained in the case?

A. No, sir; I did not.

Q. 45. Who did ask him to read that over?

A. I never did; he never told me.

Q. 46. Did he read it over?

A. I don't know whether he did or not; I believe he did.

Q. 47. Did you ever see him have it in his possession?

A. Yes, sir; I think I did.

Q. 48. Did he say anything about it when he had it in his possession?

A. He said he read my testimony.

292 Q. 49. He did in your office?

A. Yes, sir; in my office.

Q. 50. He is one of your confidential clerks, is he not?

A. He is ass't. sec. of the Swifts iron and steel w'ks.

Q. 51. He is rather a confidential man in your employ, is he not? You regard him as such, do you not?

A. Why, no; he is a smart, active salesman and a good letter-writer and a smart fellow, and that is the reason that he occupies the position as assistant secretary.

Q. 52. I didn't know but that it was because he was handsome.

A. He is a smart, well-educated young man.

Q 53. Will you let me see the stub book, and just turn to that page which shows the stub from which you testified which you produced in evidence?

Witness shows the stub book.

A. Yes.

Mr. RIDDLE: Just put it in evidence; it is the best thing.

(Stub book introduced in evidence as Exhibit —.)

Q. 54. There is a memorandum there which shows the drawing of a check, presumably for five thousand dollars, to J. A. Gimperling on the 11th day of Feb., 1882, and there is a memorandum on it which says, "Making $45,000 to date."

A. That shows for dollars.

Q. 55. What does that mean?

293 A. It is my peculiar way of making a memorandum. I don't keep any books, you know.

Q. 56. It means the amount of money you had paid out on the construction of that road?

A. Yes, sir; up to that date.

Q. 57. Which is about 11th of Feb., 1882?

A. Yes, sir.

Q. 58. That is the date these bonds were delivered?

A. Well, the receipts show.

Q. 59. Any since that occurred, the receipt?

A. There is one after that. All the construction bills had not been paid until a long time after that.

Q. 60. The intervening checks not set down there are checks drawn for some other parties, are they?

A. I cannot tell. They might have been waste paper or I might have lent checks to somebody else.

Q. 61. Now, here is a stub of March 3, 1882, which presumably shows the drawing of a check in favor of J. A. Gimperling for five thousand dollars additional, making, according to that memorandum, fifty thousand dollars in all up to March 3rd, 1882. Have you any check book showing any further payments?

A. No, sir.

Q. 62. Or stub checks?

A. No, sir.

Q. 63. When were these two memorandums made?

A. It was made at the time, no doubt—at the date it is headed.

294 Q. 64. 4 years ago or more?

A. Yes, sir.

Q. 65. And this was made at the time it was drawn?

A. Yes; no doubt made at the very time.

(Stub book offered in evidence.)

Redirect examination by Judge JORDAN:

Q. 66. When you stated the proposition and the acceptance of the railroad Co., which you were to widen and extend and convey the road to the company for the stock and the bonds, was carried out—the written contract of October 12th, 1881—state whether or not when you say you accepted the written contract you have reference also to the verbal understanding in pursuance of which that contract was made.

Counsel for the complainants object to the style of the question, and also to its form and substance.

Judge JORDAN: You can answer.

A. Yes, sir. (After a pause:) I said, Yes, sir.

Q. 67. Yes, sir? What do you mean in answering in the affirmative? What do you mean?

A. It was made in reference to the verbal and written contract of October 12th, 1881.

Recross-examination by Mr. RIDDLE:

Q. 68. And the written contract expressed the verbal understanding of the parties? I mean the contract of Oct. 12, 1881.

A. It did, in part.

295 Q. 69. Did you ever have any other agreement with them other than that contract?

A. I had an understanding in the way the organization was to be organized.

Q. 70. Prior to the contract?

A. Prior to the contract; yes, sir.

Q. 71. The contract of October 12th was not different in any way from the matters agreed on between you, was it?

A. The agreement was that there was to be no money paid in, except building the road, and that is the reason it is not mentioned in the contract.

Q. 72. You read the contract over before you signed it, did you not?

A. Yes, sir.

Q. 73. You agreed to it, then, did you not?

A. Yes, sir; but I didn't suppose anybody else could bring this in in the contract to ask me to do.

Q. 74. Things not mentioned you didn't suppose to be considered in?

A. Things not agreed on I didn't think could be brought in—that is, if my agreement was to get the road for the securities of the road, I didn't suppose there would be anything outside.

By Mr. JORDAN:

Q. 75. You mean to get the securities of the road for the road?

A. The securities for the road, and there was not to be any
296 money paid in except for the building of the road.

By Mr. RIDDLE:

Q. 76. You had no contract with Mr. Preston or McHenry as to whether anybody was to pay any money or not?

A. There was nobody to pay a nickel. It was all talked over. There was no one to pay one penny except for the building of the road. You could not have got anybody to take ten thousand dollars with that bonded debt—to have taken that road with that bonded debt.

Q. 77. Are you quite certain you had no other agreement with these gentlemen except that contract of October 12th, 1881?

A. Except what I stated.

Q. 78. Question repeated.

A. Except as I stated.

Q. 79. You read that contract over before you signed it?

A. Their lawyer drew it up and I read it over afterwards. Gahr copied it. I didn't submit it to any attorney.

Q. 80. You read it over?

A. Yes, sir.

Q. 81. And signed it?
A. And carried it out in good faith.
Q. 82. You knew what was in it?
A. I knew what was in it and carried it out in good faith. It could not have been carried out on any other basis. I had done honestly what was done.

Recess for dinner.

297 Counsel met and after discussing for some time outside of the record the question of the presentation of further evidence they withdrew and appeared in court, where the defendants, on application, were allowed until the 1st of January to produce further evidence.

298 DECEMBER 29, 1885.

Met at the office of Messrs. Jordan and Jordans, pursuant to a notice given by said Jordan and Jordans, for the purpose of taking further testimony on behalf of the defendants.
Present: Messrs. Warrington, Riddle & Boyd, on behalf of the complainants; Messrs. I. M. and J. A. Jordan, on behalf of the defendants.

JOSEPH W. WILSHIRE, a witness called on behalf of the defendants, being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by J. A. JORDAN:

Q. 1. You may state your name, age, residence, and occupation.
A. My name is Joseph W. Wilshire; age, 41; residence, Cincinnati, and occupation, a commission merchant.
Q. 2. You can state what relation you sustained on Oct. 12, 1881, if any, to the firm of Howard Eckert & Co.?
A. I was a partner.
Q. 3. On October 12, 1881?
A. Yes, sir.
Q. 4. Were you acquainted with Messrs. Preston & McHenry?
A. Yes, sir.
Q. 5. Do you remember a business transaction between Preston, McHenry, and Howard Eckert & Co. that was compromised with E. L. Harper? I mean a business transaction that was com-
299 promised, say, in the fall of 1881 or winter and fall of 1881–'2.
A. I remember such transaction between E. L. Harper and Preston & McHenry and W. E. McHenry, for whom we were agents.
Q. 6. For what parties?
A. For both parties.
Q. 7. Who were agents—Howard Eckert & Co.?
A. Yes, sir.
Q. 8. What for?
A. Preston & McHenry—J. W. Preston and W. E. McHenry. I

mention it that way because there had been two different firms recently consolidated.

Q. 9. Now, without going back into that transaction, we simply desire to call your attention to the occasion of the compromise between Mr. Harper and these gentlemen and to inquire of you if you were present or participated in any manner in the negotiations for that settlement.

A. Yes, sir; I was present at the conversation that ensued in regard to the settlement of this claim.

Q. 10. Who were here in Cincinnati that came to negotiate that settlement?

A. Messrs. Preston and McHenry.

Q. 11. Do you remember, as they entered upon that negotiation, the proposition to widen and extend this railroad which Mr. Harper owned up in the country called a narrow gauge?

Counsel for the complainants object to the question both
300 as to the form and the substance.

A. I remember that there was such a proposition made.

Q. 12. You can state now when the proposition was made if it were communicated to you. And, if so, by whom?

A. Yes; it was communicated to me by both Mr. Preston and Mr. McHenry.

Q. 13. In what manner?

A. They told me of the proposition that had been made and the terms of the proposition and asked me if I knew anything about the railroad.

Q. 14. Did they bring to you any scrap of paper or document that indicated what the proposition was?

A. Not at that time; no, sir.

Q. 15. After that first interview do you remember whether any of them went to see the road?

A. Yes, sir.

Q. 16. Who?

A. Well, I could not say with certainty whether both went or only one, but I know that one of them went over the road.

Q. 17. One of whom?

A. Either Mr. Preston or McHenry. My impression now is that it was Mr. Preston.

Q. 18. If it is the fact that he went over the road, did you learn that through a conversation with him?

A. Yes, sir.

Q. 19. Now, after he had gone over the road state what he or he and Mr. McHenry did towards again communicating with
301 you further in the sense of that conversation.

Counsel for the complainants object to the question.

A. When they returned or he returned—I have forgotten now which—I cannot say whether both or one went over the road—we had a conversation in regard to it. They spoke further of what was

necessary to do to it, and they afterwards, as I understand it, went down to see Mr. Harper.

Counsel for the complainants object to what was said by witness about his understanding.

Q. 20. Go on. You went down to see Mr. Harper.

A. Well, they went down to see Mr. Harper and they had a conversation in regard to the matter, and then, I think—I am not sure as to this point—I think both Mr. Preston and McHenry and myself had a consultation in regard to the road. I advised them not to accept the terms, not to have anything to do with the road. I didn't think it was a good contract. If I remember right, I didn't think anything growing out of the railroad would be to their benefit.

Q. 21. Well, proceed with any further statement.

A. Now, do you want me to go ahead with what I remember?

A. Yes; go ahead.

A. Shortly afterwards they informed me they had been to see Mr. Harper and he had made them a proposition which they were inclined to accept or they had accepted. They had a rough
302 sketch of this memorandum or proposition, and after looking it over I advised them that, inasmuch as they were going to accept this proposition, the best thing they could do was to consult an attorney and get an attorney in regard to the drawing up the contract. I took them with me to Mr. Ferguson's office and introduced them to Mr. Ferguson and after some preliminary conversation it was arranged for him to draw the contract as per memoran*udm* and the terms stated. Some few days afterward this contract was finished by Mr. Ferguson, drawn up in proper shape, I suppose, and we looked it over—that is, Mr. Preston, Mr. McHenry, and myself—and took it down to Mr. Harper's office. I went with them myself at the time. Mr. Harper asked for a few minutes time in which to consult his attorney as to the contract. He left the office, and after having been gone some short length of time—I don't remember how long it was—he returned and said he had consulted his attorney and the contract was all right and acceptable to him.

By Mr. WARRINGTON:

Q. 23. You are now referring to some lawyer?

A. Yes, sir; the one Harper saw.

By Judge JORDAN:

Q. 24. Pending these negotiations you may state whether anything was said about Preston and McHenry and the others taking any stock in the railroad.

A. My impression is that when they first talked to me about the proposition Mr. Harper had made—is that they were to take
303 the stock—the bonds and stock. I advised them very strongly against that, as I thought there was a large double liability on the stock. I tried to impress on their minds that in any event,

even if they took the bonds, they should not accept the stock and they seemed to agree with me on that point.

Q. 25. What you have spoken of as your impression I will ask you whether that is your recollection.

A. Yes, sir; I am quite positive of it, in fact, the conversations at least.

Q. 26. I desire to ask you this, Mr. Wilshire: From the conversations that you had with Mr. Preston, McHenry, and others, either when Mr. Harper was present or not, without being able to state any particular conversation now, what is your recollection as to the transaction in the following particulars: First, whether the road was to be widened and extended and who was to widen and extend it.

A. The road was to be widened and extended by Mr. Harper.

Q. 27. What was he to do with the road when it was widened and extended?

Counsel for the compl't- objects to the question, as the contract shows.

A. He was to organize or cause to be organized a railroad company for the operation of this road.

Q. 28. Then what was he to do with that railroad?

A. Then he was to issue stock and bonds at the rate
304 of $20,000 a mile, I think; yes, $20,000 a mile—that is, he was to issue first-mortgage bonds at the rate of $20,000 a mile and second-mortgage or income bonds at the rate of $20,000 a mile and stock at the same rate or cause them to be issued.

Q. 29. Do you recollect whether he was to convey the road to the company, the railroad itself, thus widened and extended, to the company?

Counsel for the complainants object to the question, as the contract shows for itself.

A. Yes, sir; that is my recollection.

Q. 30. Do you recollect that Mr. Harper was to convey the railroad itself, thus widened and extended, to the corporation for the securities you have mentioned?

Counsel for the complainants renew their objection.

A. Yes, sir; that was my understanding of it.

Q. 31. Now, can you state, Mr. Wilshire, how you got that understanding—from whom?

A. Oh, I cannot state it exactly; that was my understanding from the various conversations that I had with these parties; that we understood.

Q. 32. Mr. McHenry, Preston, and the others?

A. Yes, sir.

Q. 33. Do you recollect of the road being finished or whether these gentlemen came down here, and whether you had any conversation with them about its being finished and about the de-
305 livery of the bonds in pursuance of the contract?

Counsel for the complainants object to the question.

A. I don't remember anything about its being finished, because I was never on the road. Now, as regards the gentlemen coming down here. I presume you refer to Messrs. Preston and McHenry.

Q. 34. I do; yes, sir.

A. My impression is that Mr. Preston was here, and——

Q. 35. When you speak of impression, do you mean your recollection?

A. The impression on my mind at this time is that Mr. Preston went over the road, having been informed in some way, I presume, that the road was completed and the bonds ready for the delivery. He went over the road.

Q. 36. Then what was the result after he returned?

A. I had no conversation with Mr. Preston after he returned. He came, I think, just as the bonds were ready to be delivered.

Q. 37. What occurred then?

A. The bonds were brought into my office, in Pike's building, by Mr. Harper, and were there delivered to Messrs. Preston and McHenry in my presence, and the receipt was signed for the bonds both by Preston and McHenry and myself as agents for these gentlemen.

306 Q. 38. I now produce the original of the exhibit marked A, and the receipt thereto attached, being the contract of October 12, 1881, and also the receipt of Feb. 9, 1882, signed Howard Eckert and Co., and ask you to state whether you recollect what they are and where they were signed, if you know.

A. I don't remember about this receipt for five hundred dollars, par value, first mortgage, and three hundred dollars, par value, income bonds. There seems to be five hundred dollars between us somewheres.

Q. 40. Whose handwriting is that (referring to receipt)?

A. That is my handwriting, the signature.

Q. 41. And the body of the paper, in whose handwriting is that?

A. That is Mr. Harper's.

Q. 42. That is your signature, but you don't remember the transaction?

A. I remember there was five hundred dollars between us in some way. It is all right. I remember very well that we signed for $500 and received $500. I don't know what became of them.

Q. 43. Now, look at the receipt at the end of Exhibit "A." Do you recollect that?

A. Yes; I remember that very well.

Q. 44. What do you remember about that?

A. I remember this was the receipt signed on the delivery of the bonds in my office in settlement of the claim.

307 Q. 45. You may read that receipt and make it a part of your answer.

A. This receipt reads as follows:

"CINCINNATI, *Feb.* 11, 1882.

Received of E. L. Harper two hundred and fourteen thousand dollars of the 1st mortgage and one hundred and seven thousand two hundred dollars of the income bonds of the Cincinnati, Columbus and Hocking Valley Railway Co., in full of all demands on the within contract.

(Signed) W. E. McHENRY.
J. W. PRESTON & CO.
PRESTON & McHENRY.
HOWARD ECKERT & CO.,
Agents for W. E. McHenry and Preston & McHenry."

Q. 46. Now, you may state whether you understood that these bonds were delivered in pursuance of these receipts in full satisfaction of Mr. Harper's contract of compromise.

Counsel for the complainants object to the question.

A. Yes, sir; I understood that that was a receipt in full, according to the statement in this contract.

Q. 47. Was there anything said in the conversation at the time that they were talking about transferring, Mr. Harper causing a corporation to be organized and transferring the railroad,
308 widened and extended, to the corporation, about Mr. Harper furnishing or paying any money as part of that agreement?

Counsel for the complainants object to the question both as to form and substance.

A. Only in extending the road; that is all.

Q. 48. In widening and extending the road?

A. Yes, sir; that is as I understood it; he was to pay for that.

Cross-examination by Mr. WARRINGTON:

X Q. 49. Do you recollect where the memorandum is from which Mr. Ferguson drew the contract, Ex. A, about which you have just testified?

A. Exhibit A is that contract and the receipt I have been looking at.

X Q. 50. No; not the receipt; the contract of October 12, 1881.

A. The last I saw of the memorandum it was in the hands of E. A. Ferguson.

X Q. 51. Do you know who drew it—that is, in whose handwriting this memorandum was?

A. The original momorandum?

X Q 52. Yes, sir.

A. No, sir.

X Q. 53. Was it in pencil or in ink?

A. In pencil, my impression is; I am not clear about that.

309 X Q. 54. Was it from that that Mr. Ferguson drew this contract of October 12, 1881, which is signed by the parti and known in this case as Exhibit A?

A. It was from that memorandum and from the conversation Mr. Ferguson had with Messrs. Preston and McHenry.

X Q. 55. The contract was drawn in triplicate, was it?

A. Yes, sir.

X Q. 56. You have one of the copies, have you not?

A. Yes, sir.

X Q. 57. This one that I hold in my hand is another?

A. I presume it is.

Judge JORDAN: What has he in his hands?

Mr. WARRINGTON: Exhibit A.

X Q. 58. Do you know where the third copy is?

A. I do not, sir.

X Q. 59. If I understand you, Mr. Wilshire, this paper, Exhibit A, contains the agreement that was entered into.

A. Yes; I understand it so fully.

X Q 60. It is from what you recollect about this paper that you have been testifying concerning what the contract was, is it not?

A. Yes, sir.

X Q. 61. You don't know of any contract that was entered into between E. L. Harper and Preston & McHenry and J. W. Preston except such as is shown by Exhibit A, do you—that is, this paper?

310 A. I have no knowledge of any other contract bearing on this point.

X Q. 62. And you in your testimony thus far have not intended to testify that there was any contract except as is embraced and shown in his exhibit?

A. I have no intention to testify that way.

X Q. 63. What do you mean by that answer? Do you mean that there was no other contract except as shown in Exhibit A?

A. I have no knowledge that there was any other contract except the one I have just been reading.

X Q. 64. You advised Messrs. Preston & McHenry to have nothing to do with the stock of this corporation?

A. I advised them not to accept it in their settlement with Mr. Harper.

X Q. 65. They accepted and acted on that advice, did they not?

A. I presume that influenced them, as it was not accepted.

X Q. 66. That is to say, there was no stock accepted by them?

A. No, sir; there was no stock accepted by them.

X Q. 67. Will you kindly read over Exhibit A now with a view to ascertain this, as to whether there is anything in that concerning any arrangement by which Mr. Harper was to convey his road for the stock of his corporation as distinguished from the bonds thereof?

311 A. Do you wish me to read this over (referring to the contract, Exhibit A)?

X Q. 67½. Yes, sir; I wish you to read it over with the view stated.

A. Shall I read it out?

X Q. 68. No, sir; read it to yourself.

(Witness read the exhibit.)

X Q. 69. Just take your time.

A. (After reading the exhibit:) As I understand it, the road was to be completed as to the widening of the gauge and as the eastern and western extension. It was then to be delivered to the company which Mr. Harper was to cause to be organized; that company was to issue bonds and stock for the railroad; Mr. Harper was to obtain the bonds and stock so issued and to dispose of the bonds as set forth in that contrrct.

X Q. 70. That is, as set forth in the contract, Exhibit A?

A. Yes, sir.

X Q. 71. Your understanding of the contract as you now have it and state it was derived from the paper itself, was it not?

A. Entirely so.

X Q. 72. You mean exclusively so, do you not? You mean it was entirely and exclusively obtained from the written contract, do you not?

312 A. Yes, sir; in other words, I thought that everything was embodied in that contract—in that paper which you have mentioned as Exhibit A.

X Q. 73. And that is your understanding to-day, is it not?

A. That is my understanding to-day, exactly.

X Q. 74. Now, is it not true that what was understood to be done, so far as Mr. Preston and Mr. McHenry were concerned, was that they were to have nothing to do with the organization of the company, but that that was left to Mr. Harper, and that they were simply to receive the prescribed number of bonds?

A. Hold on a minute. As I understand it, according to the contract, Mr. Harper was to cause this company to be organized.

X Q. 75. Yes; and they, Messrs. Preston and McHenry, were not to have anything to do with that?

A. Mr. Harper, as I said, was to do that.

X Q. 76. Was there anything said, so far as you know, about how he was to organize that company, or was that left to him exclusively?

A. I don't remember anything that took place bearing upon that point in the conversations. There might have been something of that kind mentioned, but I can't call it to mind.

X Q. 77. Were you present at any of these conversations held at Mr. Harper's office, on 3rd street?

A. Yes, sir; I was at some of them.

X Q. 78. Do you recollect in which office the conversations took place?

313 A. My recollection is that they took place in the office of the Swifts iron and steel works—in the rear office or in the rear room.

X Q. 79. That would be the most northerly room of that house, would it not?

A. Yes, sir.

X Q. 80. It is on the first floor, is it not, on 3rd street?

A. Yes, sir; on the 1st floor.

X Q. 81. Do you recollect who were present at these conversations?

A. On which occasion?

X Q. 82. Well, just the conversations that led up to this contract.

A. Oh, well, I can't remember. I think there was Harper.

X Q. 83. E. L. Harper?

A. E. L. Harper. Mr. Preston and Mr. McHenry and myself on one or two occasions; Mr. Harper's brother—E. L. Harper's brother.

X Q. 84. Do you recollect of any others?

A. I have no recollection of any others at all.

X Q. 85. Do you recollect of Mr. Gahr ever being present?

A. I don't recollect of Mr. Gahr ever being present at any conversation. He may have been called into the office for something or other, but I don't remember of his entering into conversation.

X Q. 86. Can you recollect that he was ever present at all at any conversation?

314 A. No, sir; I cannot.

X Q 87. Now, as to Mr. Harper's brother; I believe his name is W. H. Harper. Was he ever present on more than one occasion?

A. I am not able to say with certainty as to that. I remember distinctly of his being present on one occasion.

X Q. 88. Do you recollect whether he entered into the conversation?

A. No, sir; generally speaking, he did not.

X Q. 89. Did he come in on one's request or not, so far as you know?

A. I am not able to say as to that.

X Q. 90. Do you recollect what conversations occurred when he was there?

A. I cannot particularize the conversations. It was in regard to this contract—this subject we have been testifying in regard to.

X Q. 91. What kind of a room was this? Was it a room which was partitioned off in the ordinary sense in which rooms are?

A. The office was a large one, a very large office. There was a partition across the center, I should say, or through the center—partition off the rear portion.

X Q 92. Did that partition reach from the floor to the ceiling?

A. I am unable to answer that now. I don't remember.

X Q. 93. Was this partition so high that it gave seclusion

315 to those who were there from parties who were in the front office?

A. Yes; as a screen; as regards conversations or noises of any kind I don't know. I am not able to answer that. The reason of that would be simply if the partition was not up to the ceiling of course it would not be as private as to the hearing of conversation as though it was up to the ceiling; and I don't remember whether it extended all the way up to the ceiling or not.

X Q. 94. Do you recollect how many desks there were in that room?

A. As I remember it now, there was simply one desk or table. I should call it a table, not a desk. Whether there was more than one or not I cannot say.

X Q. 95. Was that table in the center of the room, about?

A. The table was on the east side of the room; I should say in the southeast corner.

X Q. 96. And you have no recollection of any desk being in the room?

A. Oh, I have no recollection now. I remember the room was quite dark, and it would have been almost impossible to ascertain without a close scrutiny what there was in the room.

X Q. 97. Then there was no clerks in there writing?

A. No, sir.

X Q. 98. Nor any conversations at which you were present?

A. Not in the office where we held the conversations or that portion.

X Q. 99. Was Howard Eckert ever present at any of these conversations?

316 A. He may have been present at some of them. I cannot say definitely as to that point.

X Q. 100. Do you recollect about how many meetings you had there with the parties you have named?

A. I cannot; I don't. I know there were some conversations held at which I was not present.

X Q. 101. When that contract was completed by Mr. Ferguson I believe you stated that Messrs. Preston & McHenry and you took it down to Mr. Harper's, did you not?

A. Yes, sir.

X Q. 102. How long a time elapsed between your giving the contract to Mr. Harper and his returning with it from the interview with his lawyer?

A. I could not say exactly. I think not to exceed fifteen or twenty minutes.

X Q. 103. Do you know what lawyers he consulted?

A. I do not.

X Q. 104. Did he ever tell you?

A. No, sir; not that I remember of, although he may have mentioned it at the time. I don't remember.

X Q. 105. Is that Exhibit "A" the contract that he took to have examined by his lawyer?

A. It is one of the copies. I don't know as this is the identical paper.

X Q. 106. But it was one of the triplicate copies that he took to his lawyer?

A. That is as I remember it now.

317 X Q. 107. When he came back was it then executed—that is, the contract?

A. I think it was at that time.

X Q. 108. Those papers were prepared at Mr. Ferguson's office, were they?

A. I presume so.

X Q. 109. And it was there you got them when you took them down to Mr. Harper's office?

A. I don't remember whether I received them from Mr. Fergusons or not.

X Q. 110. You were present when they were received, as I understand?

A. I am not sure as to that, whether they were delivered to Messrs. Preston and McHenry or whether I was present at the time, but I know that I saw them all, however.

X Q. 111. And you and Preston and McHenry, wherever you got them, took them down to Mr. Harper's office in the way you have described?

A. I distinctly remember that. I, of course, refer to these 3 copies, of which Exhibit A is one. That is the contract that we took there.

X Q. 112. Was there ever any conversation at either of these meetings at Mr. Harper's office, as you have described it, at which anything was said about Messrs. Preston and McHenry releasing Mr. Harper from his stock liability or stock subscriptions?

A. I have no recollection of any such conversation. I re-
318 member nothing except the refusal to take the stock. On that occasion I remember nothing having been said about the stock at all.

X Q. 113. Do you recollect anything that was ever said at either of these meetings concerning stock at all except that Preston and McHenry would not take any of it?

A. I cannot answer that definitely, because the *modus operandi* of organizing this road was discussed very freely at various times. Of course, stock being part of the organization, that might have been mentioned.

X Q. 114. Have you any recollection of what was said except that Preston and McHenry would not take any of it?

A. I have not now any recollection of the conversation that ensued on that point.

X Q. 115. All these conversations, if I understand you, took place prior to the time that you carried the triplicate copies of the contract down to be signed?

A. That is as I remember it; yes, sir.

X Q. 116. And those contracts were intended to embody and embrace all that was said—all that was agreed upon, I mean?

A. That was my understanding of it.

X Q. 117. And they do so, so far as you know it, now; so far as you understand, that was exactly the terms upon which the settlement was made embodied in that contract?

A. You mean Exhibit A?

319 X Q. 118. Ex. A; yes.

A. Yes, sir.

X Q. 119. Is it not true that the conversations which you heard

concerning the transfer of the road to the company was for the securities—that is to say, the bonds?

Judge JORDAN: Do you mean the bonds alone?

Mr. WARRINGTON: Yes; as mentioned in Ex. A, the contract?

A. My understanding was that he was to transfer the railroad to the company for all the securities that were to be issued on it.

X Q. 120. What was meant by securities was the bonds, was it not?

A. And stock.

X Q. 121. Did you get that from any conversation at either of these meetings?

A. Yes, sir; I got it from the fact that he offered stock to be issued. Of course, I didn't know that he was from any conversation that took place. That was simply the impression on my mind.

X Q. 123. That is all you mean to say about it?

A. Let me make myself clear. In the first place, I understood that Mr. Harper was to issue securities at the rate of $20,000 a mile on the road completed—that is, widened and extended. He was to issue first-mortgage bonds to the extent of $20,000 a mile.
320 He was to issue income bonds to the extent of $20,000 a mile and stock for the same amount. Now, my understanding was that he was to get the whole of these securities, and out of these securities he was to receive he was to pay Preston and McHenry, as appears in this Exhibit A.

X Q. 124. But he didn't get understanding from any conversations, as I understand you?

A. I don't know that I did. That was the impression on my mind, that the transaction was to be carried out.

X Q. 125. Well, is not this the fact about it: that you got that impression from this written contract, as you have before stated; that all you mean to testify to is your understanding of this written contract?

A. Yes, sir.

X Q. 126. Have you any other source of information on that subject, except as you interpret this Ex. A, the written contract?

A. I have no other; no recollection or no knowledge of any other contract. My interpretation of the whole affair is as embodied in that contract.

X Q. 127. And not otherwise?

A. Not otherwise at all.

X Q. 128. And all that you can say and all that you have said concerning the stock as being a part that should be paid for by the transfer of the road was gathered from the written contract, Exhibit A, was it not?
321 A. Well, I cannot say that it was altogether—that is, I mean to say that there was an impression on my mind that he was. The organization was to take place was by Harper having this company which he created to issue all these securities to him, or he was to get them from the railroad company as an encum-

brance, as a mortgage on the railway Co., and out of these to pay Preston & McHenry, as the contract calls for.

X Q. 129. That is to say, the bonds as mentioned in this contract?

A. The bonds; yes, sir.

X Q. 130. And this was an impression that you got, not from conversations, but from this written paper and from the fact that there was to be a company organized, was it not?

A. Certainly; from the fact that there was to be a company organized.

X Q. 131. If Exhibit A, the contract of October 12, 1881, does not, in fact, say anything about the stock of the railway company, is it not true, Mr. Wilshire, that whatever impression you may have concerning the stock is either erroneous or that you got it from the way in which Mr. Harper actually organized his company after Exhibit A was executed?

322 A. As far as the organization of the company by Mr. Harper is concerned, I never knew anything about it. I was in total ignorance of the whole affair. As fas as Exhibit A is concerned, that is a distinct understanding as regards the settlement between Mr. Harper and Messrs. Preston and McHenry. Now, you ask me my idea of how this company was organized and how I obtained the information or impression on my mind as to the organization of the company. There was nothing said about stock in the agreement, because that didn't enter into the agreement, as I understand it. The terms of the agreement call for the execution and delivery of bonds; therefore there is nothing said, as I understand it, in the contract in reference to stock, because Mr. McHenry had refused or Mr. Preston, or both of them, had refused the stock, but in conversations that took place between Messrs. Preston and McHenry and myself and, perhaps, Mr. Harper, the matter of stock was discussed. Mr. Harper had said in his plan of organization he intended to issue stock. He offered it to Messrs. Preston and McHenry in his original proposition in settlement, and I, when they conferred with me, advised them not to take the stock. Now, all my impression in regard to the stock—in regard to the organization of the company, so far as the stock is concerned—arose from our conversations that we had in regard to it at that time.

— 132. That is, we. Who had?

323 A. That Preston and McHenry had with me. I cannot say that Mr. Harper ever said to me that he was going to issue stock, but he may have done so; but he certainly, as I understood Preston and McHenry say to me, he certainly told them that he was going to issue stock, and at one time he offered them the stock, which they refused to take.

X Q. 133. And all that McHenry or Preston said to you about that, if I understand you correctly, is that they knew he was going to issue stock, is it not?

A. Yes, sir.

X Q. 134. Now, they never told you, did they, Mr. Wilshire, how or that they knew how he was to pay for that stock?

A. No, sir.

X Q. 135. Mr. Harper never told you how he was to pay for that stock, did he?

A. No, sir.

X Q. 136. Then you didn't know how he was to pay for that stock?

A. I didn't.

X Q. 137. And you don't pretend to know that now, do you?

A. No, sir; I don't.

X Q. 138. You don't know whether he made a subscription for the stock and ever paid for it, do you?

A. I don't.

X Q. 139. You don't know how in the organization of his company he attempted to pay for the stock subscription, do
324 you?

A. As I stated in my answer a little while ago, I am in total ignorance of the organization and the manner in which it was carried out.

X Q. 139. Read to the witness and answer asked.

A. No, sir.

Redirect examination by Judge JORDAN:

Q. 140. In speaking of Mr. Gahr do you recollect that he copied the rough draft in any way in this contract?

A. I remember very distinctly of Mr. Gahr doing something of that kind, for, if I remember aright, he is a very fine penman and I remarked at the time on his penmanship, but just what that was I don't remember.

Q. 141. Do you remember that he was in and about the office there?

—. ——.

X Q. 142. In Mr. Harper's office?

A. Yes, sir.

X Q. 143. Do you recollect of having any conversation in the front office when you met there occasionally?

A. I remember of having a conversation personally with Mr. Harper.

X Q. 144. Could it not be possible that you and Mr. Harper and Mr. Preston all met in the front office as to part of the conversa-
325 tion at the time you were closing up the transaction; that part of the conversation may have been had in the front office or at the door?

Counsel for the complainants object to the question as leading.

A. As we went into the rear office we had to pass through the front office. We frequently met Mr. Harper there, but we immediately adjourned to the rear office. Any important conversation took place in the rear office.

Q. 145. I will ask you whether you recognize the signature of Mr. Gahr as a witness to the contract.

A. I am not familiar with Mr. Gahr's signature.

Q. 146. Look at this and see whether that is your signature at the end.

(Contract of October 12, 1881, handed witness.)

A. That is signed by me. Yes; that is my signature.
Q. 147. Is that paper in the handwriting of Mr. Gahr?
A. This paper? I cannot say.

326 E. L. HARPER recalled by the complainants:

Counsel for the defendants say that the testimony of this witness was entirely finished when he was on the stand before, and that if he is called now he is called by the attorneys for the complainants as their own witness.

Mr. WARRINGTON: To which complainants' counsel reply that they have recalled Mr. Harper for further cross-examination, and for no other purpose and with no other object.

Examination by Mr. WARRINGTON:

X Q. 1. Upon what bank in this city or elsewhere did you draw checks in payment of the bills or for work or for materials in any way connected with this railway?

A. I think most of them were drawn on the 3rd National bank, but I could not state. I may have when the draft became due not drawn on it, but have got the money from some other source.

X Q. 2. You mean the 3rd Nat. bank of this city?

A. Yes, sir.

X Q. 3. Will you think now and see if you can recollect whether you drew upon any other bank?

A. That I could not tell you.

X Q. 4. Have you the checks of the 3rd National?

A. I don't know whether I have or not.

X Q. 5. Will you look for them and report to us this afternoon whether you can find them; and, if you can, will you produce them?

327 A. I produced my check book the last time I was here.

X Q. 6. I am now referring to the checks themselves.

A. Yes, sir; I will look for them.

X Q. 7. Will you also examine during the adjournment to see, whether you can ascertain if you drew from any other source than the funds you had in the 3rd National bank?

A. I don't believe I could do that. I might have had the money in my pocket or in the vault.

By Mr. RIDDLE:

X Q. 8. You don't draw checks from the money in your pocket, do you?

A. No; but if a draft should come in I could pay that.

X Q. 9. Are you in the habit of carrying large sums of money in your pocket?

A. I have.

X Q. 10. At this time?

A. Yes, sir.

X Q. 11. Did you have any account except at the 3rd National?

A. I don't know. I think I did.

X Q. 12. Can you ascertain the fact and where it was, if you did?

A. I could not ascertain all these matters this afternoon.

X Q. 13. Then in what time could you?

A. Within the next 2 or 3 days.

X Q. 14. If we were to adjourn, say until Saturday, will you answer then?

328 A. I would prefer it Monday.

X Q. 15. Well, if we adjourne until Monday will you do so then?

A. Yes, sir.

X Q. 16. Have you the bank book or pass book—whatever you call it—that you used in the 3rd National bank transactions at that time?

A. I think I have.

X Q. 17. Will you produce it at the same time?

A. If my attorneys want it; yes. I have no objection to it.

X Q. 18. Do you mean to qualify that by what your counsel tell you or not?

A. I mean to say this: That private matters outside of railroads and outside of this transaction I don't think have anything to do with the case.

X Q. 19. I don't mean to ask for those. I mean to ask for the book that contains any evidence of these transactions that you speak of.

A. The book that contains the evidence of these transactions I presented to Mr. Riddle at the last examinations. Of course the pass-book deposits, you can't tell anything about them. You know a man may deposit a dollar and he may dispose of a hundred thousand dollars and it has no connection with this case.

X Q. 20. Does not that pass book also show the checks you drew?

329 A. No, sir.

X Q. 21. Was it not balanced from time to time?

A. Yes, sir; there might be traces from the balancing.

X Q. 22. It was not that book that you gave to Mr. Riddle?

A. No; just the stub check book.

X Q. 23. The check book you speak of as having been given to Mr. Riddle was the one that was given in evidence here, was it not?

A. Showing only the amounts of payments.

X Q. 24. I mean that was produced in evidence.

A. I gave it in evidence. I don't know what he did with it.

X Q. 25. You produced it here at the request of your counsel, did you not?

A. No; at his, I think.

X Q. 26. And you gave it to the commissioner?

A. No; I gave it to Mr. Riddle.

X Q. 27. Did you not produce it here as part of the evidence?

A. I produced it on cross-examination at Mr. Riddle's request.

X Q. 28. And the fact is that the commissioner now has it?

A. Mr. Riddle now has it.

X Q. 29. The commissioner appears as the custodian of it, does he not?

A. I suppose so; I don't know. It belongs to the evidence.

330 X Q. 30. I refer now to the Exhibit E of the testimony. Tell us where the checks are that have been torn from this Exhibit E—the stub book.

A. That is a thing I could not tell you. I don't know whether the books have been balanced since that. I can find out.

X Q. 31. Will you also answer that question when you appear upon the stand and produce the checks if you find them?

A. I have not been in the habit of keeping anything of that kind when returned.

X Q. 32. So far as your connection with the Swift's iron and steel works is concerned, you keep a book-keeper?

A. Yes, sir.

X Q. 33. And every transaction goes through your books?

A. Yes, sir; all that we have; certainly.

X Q. 34. How is that with reference to E. L. Harper & Co.?

A. That has no connection with this case.

X Q. 35. I mean, do you keep a record of your transactions?

A. As a firm business, certainly.

X Q. 36. Now, do you mean you didn't keep any record of the transactions of this railroad?

A. I didn't keep any personal books. This is a personal matter.

X Q. 37. Did you not keep some record of the monies that you paid out there so that we can inspect the record?

331 A. No, sir; I kept no personal books; never have kept any personal books at all; never any credit transactions on my books.

X Q. 38. When you speak of keeping money in your pocket, do you mean by money in your pockets for us to understand hundreds of thousand- of dollars?

A. I have a good deal more than that of cash on hand many a time.

X Q. 38. Observe, I am not asking you about what you consider cash on hand. I am directing my question only to the cash in your pockets. Did you keep cash in your pockets for the pay-roll, first, of this road?

A. I didn't keep it in my pockets, but in my vaults; I have burglar vaults.

X Q. 40. We will lay aside the sale for a moment. I am referring to your answer made a few moments ago. Did you ever pay any drafts from the cash in your pockets in connection with this railroad?

A. That I could not tell you. I think I have.

X Q. 41. Can you tell us who, the consideration of the draft, for what it was in payment?

A. I could not tell you anything about it at present.

X Q. 42. Could you give us the date of it?

A. Of course, I cannot remember any particular instance.

X Q. 43. You are not in the habit of carrying as much as a thousand dollars in your pocket, are you?

A. I have had one hundred thousand dollars in my pocket in cash many a time.

332 & 333 X Q. 44. Do you mean that you carried it around and made payments from it in your business transactions?

A. My business transactions have no connection with my personal matters.

X Q. 45. No part of this was in connection with the firm of E. L. Harper & Co. or the Swift's iron and steel works.

A. I don't remember.

X Q. 46. I asked you whether it was a business transaction.

A. It was the same as I have said—personal matters.

X Q. 47. Do you mean to say that you carried around a hundred thousand dollars with reference to your own private affairs and paid out sums of that size from your pockets?

A. Well, I paid those Chicago fellows a good many thousands of dollars.

X Q. 48. Just handed them the money in cash?

A. Always in cash; no checks.

X Q. 49. You paid it to Mr. Wilshire, did you not?

A. I never paid anything but currency. I paid him as high as fifty thousand dollars a day in money.

X Q. 50. Now, referring again to this railroad, do you mean to say that you carried cash around in your pocket to pay the bills of the railroad?

A. I say I might have had the cash in my vault.

X Q. 51. Did you say that you carried it in your pockets to pay any of the bills connected with this railroad?

334 A. I answered those questions fully.

X Q. 52. Will you answer that question?

A. I could not state, but I think I paid some of them from cash on hands.

X Q. 53. Do you mean to say from cash in your pockets?

A. Cash or my vault. I told you I had a vault.

X Q. 53½. Did you pay any from the cash you carried in your pockets?

A. How many — do you want me to answer that? I don't know.

X Q. 54. I want you to answer that question.

A. I can't answer it, because I have no recollection of it.

X Q. 55. Well, then, you don't know. Can you tell one single bill, either in amount or the person who got the money or the date of the transaction, that you paid from cash in your vault connected with this railroad?

A. I think I paid the first twenty thousand dollars on the railroad from cash.

X Q. —. To whom?

A. To the parties I bought it of.

X Q. 57. From cash in your vault?

A. Yes, sir.

X Q. 58. That was not in this transaction. That was in the purchase of the railroad originally. I am framing my question to thos sort of a transaction: That is the money you paid out——

335 A. What is the use of asking me such a question when I say I don't know?

X Q. 59. What I want you to answer is this question: Can you tell whether you paid any money connected with the extension or widening of this road to any one from cash in your safe? If you can, do; if you cannot, say so.

A. I cannot tell.

X Q. 60. What time will you be back here to answer these other questions—the checks, with reference to the checks—after you have made an examination to find them?

A. I cannot do that without considerable time.

X Q. 61. Fix your time.

A. I can do it in a week from to-day.

Mr. HARPER: I would like to have the stub-check book.

Mr. RIDDLE: Complainants' counsel ask that the witness make search and produce the papers called for before the first day of January next, as that is the time the defendants' testimony is to close, and that the witness make his answers by Thursday morning at 10 o'clock.

Mr. HARPER: I would like to make it 3 o'clock.

Mr. RIDDLE: And then we ask that the adjournment be had until that time for that purpose. This is asked not with the purpose of preventing the defendants from putting on any witness they may desire between now and that time.

Judge JORDAN: Counsel for the defendants will determine
336 what witnesses to put on when we know that counsel for complainants are through with the witness we have *have* put on and who is being cross-examined.

Mr. RIDDLE: I object to the witness, Mr. Harper, taking the stub book, Exhibit E.

Judge JORDAN: I suggest that he has the possession of the book for the purpose of making up his answers to the questions asked of him.

Mr. RIDDLE: I object to his taking them out of the hands of the examiner.

Mr. Harper finally stated that he would not take the stub book as he originally desired to do.

Adjourned until Thursday, December 31, 1885.

337 THURSDAY, *December 30th*, 1885.

Met pursuant to adjournment.

Present: Messrs. Riddle and Boyd, for the complainants, and I. M. Jordan, for the defendants.

The witness, Mr. HARPER, being on the stand for further cross-examination.

Examination by Mr. RIDDLE:

X Q. 62. The bonds of the Cincinnati, Columbus and Hocking Valley Railroad Company were, as I understand it, Mr. Harper, issues to the trust company and made payable to bearer. The bonds will speak for themselves.

By Mr. RIDDLE:

X Q. 63. (Reading a bond.) The bond reads: "Hereby knowledges its indebtedness to the Union Trust Co. or bearer in the sum of one thousand dollars."

A. The bonds were issued by the railroad company to the Union Trust Company; then they were certified and delivered to the railroad company. Here is the issue and the bonds right there.

X Q. 64. That is the certificate?

A. The bonds are issued to them, and then they are certified to by them and given out.

X Q. 65. There is none given in evidence.

A. The bonds were issued the same as ordinary railroad bonds.

X Q. 66. And were payable to the trust company or bearer in this case?

A. Yes, sir.

338 X Q. 67. And were payable to the trust company or bearer in this case?

A. Yes, sir.

X Q. 68. Have you the vouchers called for on Tuesday?

A. I have all I could find.

(To Mr. Jordan: Shall I put them in?)

Judge JORDAN: Yes, sir.

Mr. RIDDLE: Let me see them first.

Mr. JORDAN: He now furnishes them as statements of evidence.

By Mr. RIDDLE:

X Q. 69. By the way, Mr. Harper, who owns the rolling stock now on that road?

A. That is undecided who owns it.

X Q. 70. Who claims it?

A. I believe the road claims it.

X Q. 71. Who else claims it?

A. I claim an interest in it.

X Q. —. How much of an interest?

A. I don't claim they ever paid me for it.

X Q. 72. You claim the whole interest in it, then?

A. I claim the rent for it up to the present time.

X Q. 73. Well, until it is decided, who owns it?

A. Up until what question is decided, do you mean?

X Q. 73½. The ownership. My first question was, who owns the

rolling stock; you say the road claims it. My other question was, who else claims the ownership of the rolling stock.

A. I claim they never have paid me for it.

X Q. 74. The check-book you produced here, Mr. Harper,
339 were the stubs of a check book on the 3rd National bank, was it not?

A. Yes, sir.

X Q. 75. What is that, Mr. Harper?

(Paper shown witness.)

A. That is a draft for six thousand dollars made by Mr. Gimperling on me on account of the road.

X Q. 76. What is the date of it?

A. November 29th, 1881.

Paper offered in evidence, marked Exhibit A.

X Q. 77. What is that?

Another paper shown witness.

A. Dec. 10, 1881, check to J. E. Gimperling for six thousand dolla-s on account of railroad construction.

X Q. 78. Was that check given in payment of the draft?

A. Why certainly not, when the draft is payable to the bank here. The draft is collected by the German National bank and this check by the Citizens' National bank, do you see. They are entirely separate transactions, these two.

X Q. 79. What was the draft given for?

A. On account of the construction.

X Q. 80. What was the check given for?

A. The same thing.

X Q. 81. The draft was drawn by Mr. Gimperling upon you?

A. Yes, sir.

X Q. 82. And the check was given to Mr. Gimperling by you?

A. Yes, sir.

340 X Q. 83. How was the draft paid?

A. I don't know. I think, perhaps, in cash. It is receipted by the German National bank, while the check is collected through the Citizens' National bank.

Draft offered in evidence, marked Exhibit B.

X Q. 84. What is that?

Another paper shown witness.

A. That is a check to J. E. Gimperling on account of construction, collected through the Winter's National Bank of Dayton, Ohio, and the Metropolitan Bank of Cincinnati.

Check offered in evidence, marked Exhibit C.

X Q. 85. Were all the checks you drew in payment of work done on the construction of the railroad taken from the stub book which you have present here?

A. Well, you have the checks. Those will speak for themselves. They are all on the construction or in payment of accounts.

X Q. 86. Were they all taken from that check book?

A. That I cannot tell. The checks speak for themselves. They have their endorsements and the parties collected them.

X Q. 87. What is that?

Another paper shown witness.

A. That is a check for seven thousand dollars, payable to J. E. Gimperling, and collected through the Winter's National
341 Bank of Dayton and the Metropolitan National Bank of Cincinnati. The check is on the 3rd National of Cincinnati.

X Q. 88. When is it dated?

A. Dec. 26, 1881.

Check offered in evidence, marked Exhibit D.

X Q. 89. What is that?

Another paper shown witness.

A. January 12, 1882, check for six thousand dollars, payable to J. E. Gimperling, and collected through the Winter's National Bank of Dayton and the Citizens' National Bank of Cincinnati—a check on the 3rd National Bank of Cincinnati.

Check offered in evidence, marked Exhibit E.

X Q. 90. What is that?

Another paper shown witness.

A. A check on the 3rd National Bank of Cincinnati, dated January 22, 1882, and payable to the Winter's National Bank of Dayton, Ohio, for the credit of J. E. Gimperling, five thousand dollars.

Paper offered in evidence, marked Exhibit F.

X Q. 91. What is that?

(Another paper shown witness.)

A. A check dated February 11, 1882, on the 3rd National bank in favor of J. E. Gimperling, five thousand dollors, on the Winter's National Bank of Dayton, Ohio, and the Citizens' National Bank of Cincinnati, Ohio.

Check offered in evidence, marked Ex. "G."

X Q. 92. What is that?

Another paper shown witness.

342 A. My check of March 3rd, 1882, payable on the 3rd National bank, to the order of J. E. Gimperling, five thousand dollars, collected through the Winter's National Bank of Dayton and the Citizens' National Bank of Cincinnati.

Check offered in evidence, marked Exhibit H.

X Q. 93. What was that given for?

A. On account of construction.

X Q. 94. What is that?

Another paper shown witness.

A. That is a draft drawn by J. E. Gimperling March 14, 1882, for fifteen hundred dollars.

Mr. JORDAN: On whom?

The WITNESS: On myself, and collected through the Winter's National Bank of Dayton and the Citizens' National Bank of Cincinnati, on account of construction.

Paper offered in evidence, marked Exhibit I.

By Mr. RIDDLE:

X Q. 95. Please identify that document.

Paper shown witness.

A. April 3rd, 1882, my check on the 3rd National, to the order of J. E. Gimperling, $5,316.97, collected through the Winter's National Bank of Dayton and the Citizens' National Bank of Cincinnati, on account of construction.

Check offered in evidence, marked Exhibit J.

343 X Q. 96. Please identify that document.

Paper shown witness.

A. March 6, 1882, my check on the 3rd National Bank of Cincinnati, to the order of J. E. Gimperling, collected through the Winter's National Bank of Dayton and the Metropolitan National Bank of Cincinnati, two thousand dollars, on account of construction.

Check offered in evidence, marked Exhibit K.

X Q. 97. Please identify that document.

Paper shown witness.

A. June 17th, 1882, draft of J. E. Gimperling on myself, sight draft, collected through the Winter's National Bank of Dayton, Ohio, and the Citizens' National Bank of Cincinnati, Ohio, on account of construction.

Draft offered in evidence, marked Exhibit L.

X Q. 98. What is that, Mr. Harper?

Paper shown witness.

A. My check on the 3rd National bank, payable to the order of the Franklin Bank of Cincinnati, forty-five hundred dollars, in payment of a draft on account of the railroad.

Mr. JORDAN: What is it for?

The WITNESS: I don't know what the draft is for; it is on account of the railroad.

Mr. JORDAN: This railroad?

The WITNESS: Yes, sir.

By Mr. RIDDLE:

X Q. 99. That check and that draft go together?

344 A. Yes, sir; the check pays the draft.

Check & draft offered in evidence, marked Exhibit M.

X Q. 100. What is that?

Another paper shown witness.

A. That is my check on the 3rd National Bank of Cincinnati, dated January 28, 1882, to the 3rd National Bank of Cincinnati for that exchange, on account of the bonds of this railroad.

Paper offered in evidence, marked Exhibit N.

X Q. 101. On account of the bonds for the railroad?

A. Yes, sir.

X Q. 102. What do you mean by that?

A. For executing the bonds and engraving them.

X Q. 103. Was that any part of the construction of the railroad?

A. The draft went to the American Bank Note Co. of New York. It is on account of the railroad.

X Q 104. Was it any part of the construction of the road?

A. The bonds were part of the railroad organization.

X Q. 105. You understand my question? I don't care to repeat it.

A. It is a part of the railroad expenses. Of course, anybody knows that bonds are not construction.

Mr. RIDDLE: I may know and I may not. I am asking you.

Mr. JORDAN: He has made his answer.

Mr. RIDDLE: No; he has not. I want to know if the bonds issued by the Cincinnati, Columbus and Hocking Valley Railroad Co. are any part of the construction of that road.

345 A. It is a part of the expenses of the road.

X Q. 106. Well, was it any part of the construction of the road? You know what it is to construct a road, don't you?

A. Anybody who gets a lesson like I have here will never forget it.

X Q. 107. That is the reason I am inquiring of you. Now, is a bond any part of the construction of the road?

A. They are not, I suppose, any part of the construction, but they are a part of the expenses of the railroad.

X Q. 108. Where did you find these checks and drafts?

A. I found them in various places in my desk.

X Q. 109. Have you had them on your possession all the time?

A. Why, I suppose I have. It took a good deal of time and trouble to get them, for they were in a dozen different places.

X Q. 110. Do they show the amount of money you paid out on the road?

A. I don't think they do; not all of it.

X Q. 111. You have no other evidences of the money that you paid out except these drafts and checks, have you?

A. I have paid more than these.

X Q. 112. I am asking you for receipts and drafts.

A. I have paid more than these call for; but those are all I could put my hand on.

X Q. 113. Those are all the written evidences that you
346 had, are they?

A. Yes, sir.

Mr. JORDAN: He says that he could put his hand on.

By Mr. RIDDLE:

X Q. 114. Have you the deed of conveyance by which you transferred the railroad to the corporation?

A. I have never seen it since Mr. Jenny, the attorney, attended to it. I think they were all delivered to the railroad company at the time.

X Q. 115. In your testimony, or rather at the request of your counsel, it was agreed that the original deed or a copy of it might be put in evidence—a certified copy—some time ago. (To Mr. Jordan:) That is on the record, Mr. Jordan, and the judge wanted it in. (To the witness:) Will you procure a copy of that deed, a certified copy, and hand it to the commissioner?

Mr. JORDAN: You can get a copy from the records.

Mr. RIDDLE: I know, but it goes in as part of your record by agreement.

Mr. JORDAN: I don't think he ought to be put to the expense when you can get it as well as he can.

Mr. RIDDLE: You don't mind the expense. It only cost a dollar. You agreed, Mr. Jordan, to put it in.

Mr. JORDAN: Whatever has been agreed to be done will be done.

By Mr. RIDDLE:

X Q. 116. Do you know what the consideration of that deed was, Mr. Harper?

347 A. No; I don't.

Mr. JORDAN: Yes; I mean the deed from Harper to the Cincinnati, Columbus and Hocking Valley Railroad Company.

A. I think it was one dollars and other considerations, but I can't tell.

X Q. 117. The deed will show?

A. Yes; the deed will show.

X Q. 118. What, as a matter of fact, did you receive from the corporation when you delivered it that deed?

A. I received the bonds and stock, the stock subscriptions according to contract.

X Q. 119. According to the contract made with the company?

A. Yes, sir.

X Q. 120. Exhibit B, the little red book, which is put in evidence here?

A. That is the stock-subscription book.

X Q. 121. Yes; and contains your proposition also?

A. It is the large book, not the little red book.

Mr. RIDDLE: It is Exhibit C instead of Exhibit B; the minutes will show.

X Q. 122. Do you remember when the bonds of the Cincinnati, Columbus and Hocking Valley Railway Co. were dated?

A. It was the 2nd of January, 1882.

Mr. JORDAN: Might they not have been dated back?

348 The WITNESS: The date and everything was there.

Mr. RIDDLE: The 2nd day of January, as a matter of fact?

The WITNESS: The bonds will show. You see I had such a short time to construct the road that all these mortgages and everything had to be pushed to get them out within the four months.

Mr. RIDDLE: That is true. I also inquired about what the date of the bonds were as it appears on their face. That is all unless you think of more.

The WITNESS: The road cost me double as much money as I expected it would.

Redirect examination by Mr. JORDAN:

Q. 123. You may now state, Mr. Harper, whether in answer to the request of the counsel for the complainants you have brought before the commissioner the papers and statements showing substantially the amount of money paid by you in the construction of the railroad in controversy and the expenses incurred by you in connection with the same.

Counsel for the complainants object to the question.

A. Yes, sir.

Q. 124. You may now state who it *it* was who attended to the widening of this road and the extending of it after the time

349 that you made the contract of Oct. 12th, 1881. What person did that?

A. J. E. Gimperling was the superintendent of construction.

Q. 125. Who was J. E. Gimperling? The president of the road, or what relation did he sustain to the road, if any?

A. He was superintendent. He sustained no relation to the road after it was constructed.

Q. 126. Who furnished the money that you have been referring to for the construction of that road and the expenses in connection with it?

A. I paid the entire business—about $185,000.

Q. 127. Have you the statement made to you by J. E. Gimperling, showing the amount of money paid on account of the construction of that road?

Counsel for the complainants object to the question.

A. Yes, sir.

Q. 128. Have you that paper now here, and did you bring it in answer to the question put to you by counsel on the other side?

Counsel for complainants object to the question.

A. Yes, sir.

Q. 129. You may take that paper and now produce it as part of your evidence and mark it as Exhibit O.

Counsel for the complainants object to the introduction of the memorandum made by Mr. Harper or by Mr. Gimperling as irrelevant and incompetent, both.

350 Statement offered in evidence, marked Exhibit O.

Q. 130. Commence with the first paper, Mr. Harper, furnished by Mr. Gimperling, so as to get these consecutive and in order.

A. This is the first statement of the items of expenses and credits for the money paid.

Q. 131. Furnished you by Mr. Gimperling?

A. Furnished me by Mr. Gimperling; yes, sir.

Q. 132. It shows how much?

A. $47,353.24.

Q. 133. Do you mean paid out by you?

A. Yes, sir.

Q. 134. Through him?

A. Paid out by Mr. Gimperling for my account.

A. 135. Now take the next statement of account rendered by him to you.

A. The next starts with February 19, 1882, and is a continuation of the other account—that is, the expense of it. It shows the additional amount of sixty-five hundred dollars; the footing, $11,816.97.

Statement offered in evidence, marked Exhibit P.

Q. 136. The statement by Mr. Gimperling is what?

A. The next statement has no date, being unpaid vouchers and pay-rolls.

Q. 137. Showing how much?

351 A. Well, about $44,075.89, paid by my check on the 3rd National bank, dated May 6, 1882, and a draft on me, June 17.

Statement offered in evidence, marked Exhibit Q.

Q. 138. What is the next statement?

A. The next is April 1, 1882, a recapitulation of where the money went that passed through him. There was a considerable or a large amount of money that didn't pass through him and, of course, didn't appear on his account, so he gives a recapitulation of it, $80,170.68.

Q. 139. That is a recapitulation, do I understand you to say, of what, now?

A. Of the construction account.

Statement offered in evidence, marked Exhibit R.

Q. —. Now, who advanced the money that entered into that construction account?

A. I paid all the money and paid all the expenses.

Q. 141. You may now state whether, in connection with the construction of this road or in expenses in relation to it, you paid other sums of money in addition to the $80,170.68 above stated, and state when they were paid and what for, according to your best knowledge and recollection.

Counsel for the complainants object to the question both as to its form and substance.

A. In the memorandum—that is, as near as I can remember—
352 there is a considerable amount of these things that were paid direct, money and matters of that kind, that I have no checks or evidence of, but I have checks for the following, in addition to the $80,180.68: I paid, April 7, 1882, $53,016.97; you have the check; May 6th, $2,000; you have the check; draft, June 17, $24,075.89; draft, March 21, $4,500, money paid for passenger cars, as near as I can recollect; $5,500 to J. E. Gimperling; about $5,000 to the American Bank Note Company for engraving and executing the bonds of the various kinds; twenty miles of narrow-gauge railroad that I had sold when these gentlemen made the contract and I explained to them at the time for $75,000; makes in all about $185,000.

Memorandum from which the witness read the above items offered in evidence, marked Exhibit S.

Counsel for the complainants move to strike out all the exhibits other than the checks and drafts in evidence as immaterial and incompetent.

A. 142. You may now state whether these expenses that you have been referring to are or are not the expenses to you of this railroad, including its widening and extension, and which you say makes about $185,000.

A. Yes, sir; they represent actual cash paid by me.

Q. 143. In addition to these items and amounts represented in the first place by the accounts furnished and presented to you by
353 Mr. Gimperling from time to time during the construction of the work and the checks which you have made part of your evidence in answer to the questions propounded by Mr. Riddle, and also in addition to the several items that you have enumerated as making up the sum of about $185,000, were there any other sums of money which you paid in the way of attorney's fees, in the way of the recording of papers, or any other expenses connected with this road and constituting a part of its expenses or cost to you? If so, you may state what those items were, in a general way, in character and amount.

Counsel for the complainants object to the question, both as to

form and substance, and as being not only leading but misleading and suggestive.

A. I have paid out considerable money that I have called to account since I have made up this memorandum in the way of expenses for attorneys' fees and other things that I can't tell exactly how, but I remember paying my attorneys for getting up the organization the sum, I think, in the neighborhood of three thousand dollars, and I paid the expenses of my men in going to New York and executing the bonds. Of course, I trust to my memorandum as to the amount of these things; undoubtedly I have forgotten a great deal, but, taking into consideration the interest and cost and everything, I think I am out more than two hundred thousand dollars in cash.

354 Counsel for the complainants move to strike out the answer.

Q. 144. You may state whether you have in your possession or in the possession of your counsel an offer to you or a proposition to you for the purchase of this narrow-gauge road from anybody shortly to the time that you entered into the arrangement of October 12, 1881; and, if so, what that proposition was.

Counsel for the complainants object to the question, both as to the form and substance.

A. I have a proposition—my attorneys have in their possession—of $75,000 for the twenty miles of narrow-gauge railroad.

Q. 145. Did you or not make known the existence of that offer or that you had such an offer to these gentlemen represented by Mr. Riddle?

Counsel for the complainants object to the question.

A. Yes, sir; I explained I had sold for seventy-five thousand dollars as a narrow gauge, and I could just cancel it on a technicality at the time—at the time I proposed to settle their account. I proposed to give them twenty thousand dollars a mile for the first-mortgage bonds on the narrow gauge and make them a present of the same amount of income bonds and the same amount of stock, but after they examined the property they wanted me to extend it and widen this gauge, and, not expecting it would cost me
355 anything like this sum that I have explained here, I entered into the contract; otherwise I would not have done so.

Mr. RIDDLE: I withdraw my objection to this question.

Recross-examination by Mr. RIDDLE:

Q. 146. Where did you get the papers marked Exhibit- O, *E*, Q, R, and S, Mr. Harper?

A. Where did I get them originally?

Q. 147. Where did you get them? Yes, sir.

A. I got them from J. E. Gimperling, the auditor of the road.

Q. 148. How long have you had them?

A. I didn't know that I had them at all until I was looking over my papers, but I must have got them at the time the money was paid.

Q. 149. Do you know anything about the correctness of the figures contained in these papers yourself?

A. The accounts speak for themselves.

Q. 150. Well, have you ever footed up the columns of figures?

A. I never have; no, sir; never added those up.

Q. 151. Where did you get the paper marked Exhibit S?

A. That I had made out from the synopsis; the recapitulation of the expenses.

Q. 152. Was the Exhibit S made from the data contained in the papers O, P, Q, and R?

356 A. The $80,000 is; yes, sir. That represents the checks and the contract for the narrow gauge at seventy-five thousand dollars. I made it up from that.

Q. 153. Where did you get the balance of the data for Exhibit S?

A. What balance is there?

Q. 154. You say the $80,000 you got from the Exhibits O, P, Q, and R?

A. Most of the balance is made up from these checks and drafts.

Q. 155. Is any of it taken from any books of account?

A. No, sir.

Q. 156. Where did Mr. Gimperling get the data for making up the Exhibits O, P, Q, and R?

A. That represents the money paid out. The accounts, I expect, show.

Q. 157. Where did he get the data; where did Mr. Gimperling get the data?

A. I cannot speak for Mr. Gimperling.

Q. 158. Is any part of that data contained in the books of E. L. Harper & Co.?

A. No, sir; E. L. Harper and Company's books don't keep my private matters at all.

Q. 159. Well, how did you arrive at it, getting at the account of your private matters?

A. Well, a man that don't keep any private books has get to rely a great deal upon his memory, but in this case I happen to have the checks and drafts representing the accounts and the detail

357 statement made by Mr. Gimperling.

Q. 160. Look at the paper marked Exhibit S and tell me what the seven items there, commencing at the second item on the page, consist of and whether or not they are not items of running expenses, independent of the work of construction itself, the widening of the gauge and the grading and extension of the termini of that road.

A. Not one penny of it was running expenses. I never ran the road. When I complied with my contract my expenses ceased.

Q. 161. Well, are not these items incidental to the widening of the road and not part of the cost of the construction itself; for instance, there is nothing in these items about the purchase of rails or

the grading or widening of the old track? I am speaking of Exhibit S. You have got it there.

A. This statement shows that part of them are railroad ties, fences, and right of way.

—. ——.

A. Exhibit # Q shows.

Q. 163. I am not talking about # Q. I am speaking about the items on Exhibit S only.

A. Which amount do you refer to?

Q. 164. I am asking you to say what portion of the items of expense is for the right of way other than the first item. I have specified seven items. These are the items I am calling your attention to.

358 A. The statements speak for themselves, and this one of Gimperling's, this $53,016.07, is the balance of the money paid this statement here marked Exhibit P, showing the money spent for construction entirely.

Q. 165. You said that you informed Messrs. Preston and McHenry that you had an offer for the narrow-gauge railroad of seventy-five thousand dollars. Now, when and where did you inform them of that fact?

A. I informed them in the interviews several times—that is, it might have been repeated several times.

Q. 166. Who was present at any of these times?

A. I believes they were all present.

Q. 167. Well, name them, pleas-.

A. Mr. Preston, Mr. Wilshire, and Mr. McHenry also, and my proposition was to give them twenty thousand dollars a mile on the narrow-gauge road; not as a standard gauge at all.

Q. 168. Do you recollect when it was?

A. It was previous to their going on the road?

Q. 169. Previous to the execution of the contract of October 12th, 1881?

A. Yes, sir.

Redirect examination by Mr. I. M. JORDAN:

Q. 170. You may now state whether you have in your possession the paper that you referred to, being the offer of seventy-five thousand dollars for this railroad in controversy prior to the time of
359 your agreement of October 12th, 1881. If so, you may make such paper an exhibit to your testimony.

Counsel for the complainants object to the introduction of the paper.

A. Yes, sir; I have such a paper and make it an exhibit to my testimony, dates Sept. 19, 1881—an offer of seventy-five thousand dollars cash for the twenty miles of narrow gauge.

Q. 171. Before the same was widened?

A. Before any money was spent on it by me of any description.

Q. 172. On whose behalf was that offer made?

Counsel for the complainants object to the question.

A. J. E. Gimperling makes the proposition on behalf of Alfred Sully, of New York.

Proposition offered in evidence, marked Exhibit T.

Recross-examination by Mr. RIDDLE:

Q. 173. Where was that paper written?
A. That was written in my office.
Q. 174. By whom?
A. By Mr. Gahr.
Q. 175. Who is J. E. Gimperling?
A. J. E. Gimperling is a gentleman who lives in Dayton, Ohio.
Q. 176. What was his business then?
A. He was in the railroad business prior to this time.
360 Q. 177. In whose employ was he at that time?
A. That I could not tell you.
Q. 178. Had he been doing work for you?
A. He was receiver of the narrow-gauge road before I bought it.

Counsel for the complainants move to exclude the paper marked Exhibit T.
The defendants here rest.

361 *Testimony in Rebuttal.*

The defendants having rested their testimony, the complainants introduced the following testimony in rebuttal:

HOWARD ECKERT, being called on behalf of the complainants and first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. RIDDLE:

Q. 1. Who are you and where do you live?
A. I am Howard Eckert, they call me, and I live in Avondale.
Q. 2. What is your business?
A. The commission business.
Q. 3. How long have you been a commission merchant? About how long?
A. About twenty-odd years.
Q. 4. How long in Cincinnati?
A. I came to Cincinnati in 1862.
Q. 5. Do you know E. L. Harper?
A. Yes, sir; by sight.
Q. 6. What is your firm?
A. Now?
Q. 7. Yes, sir.
A. Wilshire, Eckert and Company.
Q. 8. What was it in October, 1881?
A. I believe it was Howard Eckert & Co.

Q. 9. Who were the partners in the firm at that time?
362 A. Jos. W. Wilshire and myself.
Q. 10. Do you know J. W. Preston?
A. Yes, sir.
Q. 11. Do you know J. W. Wilshire?
A. Yes, sir.
Q. 12. Do you know William E. McHenry?
A. Yes, sir.
Q. 13. Do you know anything about the settlement that took place between E. L. Harper, one of the defendants in this suit, and Preston and McHenry and J. W. Preston & Co., Wm. E. McHenry and Howard Eckert & Co.? Do you know that there was a settlement of a disputed account between these parties?
A. I know there was a settlement.
Q. 14. About when; Oct., 1881?
A. Well, it was in that year. I don't remember the exact date.
Q. 15. What did you have to do with that settlement?
A. I didn't have anything to do with that settlement.
Q. 16. Were you present at any interviews or conversations leading up to that settlement?
A. Not to my recollection.

Cross-examination by Mr. JORDAN:

X Q. 17. Have you stated who your partners were at that time?
A. I have stated who my partners was at that time.
363 X Q. 18. Did you state it was Mr. Wilshire?
A. Yes, sir.
X Q. 19. You two constitute- the firm of Howard Eckert & Co. at that time?
A. Yes, sir.
X Q. 20. You are acquainted with these Chicago men?
A. Yes, sir.
X Q. 21. What business were they in?
A. The commission business.
X Q. 22. What business were you in at that time?
A. The commission business; brokerage business.
Q. 23. Where was your office or place of business?
A. # 5 College building.
Q. 24. You didn't keep on hand the grain and produce that you dealt in, at all, did you?

Counsel for the complainants object to the question.

A. No; we only had the office.
Q. 25. You only had the office and you didn't keep the articles that you bought and sold anywheres?
A. Not in the office.
Q. 26. You didn't keep it anywhere else on hand?

Counsel for the complainants object to the question.

Q. 27. Last question repeated and modified as follows: You simply dealt in options, did you not?

Mr. RIDDLE: You need not answer that question unless you want to. It is wholly immaterial, irrelevant, inconclusive, and unimportant.

Mr. JORDAN: You cannot tell how important it might be,
364 for the defendants' counsel claim that this bears on his knowledge as to whether there was a settlement of a disputed matter between the parties to which he has referred.

Mr. RIDDLE: You make him your witness, then.

Mr. JORDAN: I ask him the question to state whether they kept on hands at that time the articles in which they claim to have been commission merchants or whether they simply dealt in options in merchandise for various parties.

Mr. RIDDLE: Answer that question only as you want to. It is wholly outside of the case in every respect. Now, if you want to answer it go on, but I want to advise the witness that he may decline to answer if he desires to do so.

The WITNESS: I could not answer it. Sometimes we handled cash property and sometimes we didn't.

By Mr. JORDAN:

Q. 28. What do you mean by cash property?

A. Well, that property was carried sometimes in Chicago. I am not *I am not* speaking of this case; you refer to this case. I cannot remember about this case at all.

X Q. 29. I will ask you, then, in this case, whether your firm didn't deal very largely on behalf of Messrs. Preston and McHenry in connection with E. L. Harper in the ordinary transactions out of which this dispute grew, and that you didn't have on hands
365 the property which was the subject of the dealings between these persons. Is that not so?

Mr. RIDDLE: You need not answer that question.

A. I could not answer.

X Q. 30. Are you willing to swear that you didn't have on hand that property which was the subject of the barter and sale by you as commission merchants on behalf of Messrs. McHenry and Preston in their dealings with E. L. Harper?

A. I did not have it.

X Q. 31. Did your firm have it on hand?

A. I don't know it.

X Q. 32. Did you ever see any of it?

A. No; I was not there.

X Q. 33. Did you know that they had it on hand?

A. I don't know that.

X Q. 34. Is it not the best of your opinion and belief that they didn't have it on hand?

A. I could not answer that.

Counsel for the complainants object to the last several questions put to the witness on the subject now being examined about.

X Q. 35. At or about the time that the settlement or compromise

was made, to which you have referred, did you know or did you not know that either Preston or McHenry went up to look at this narrow-gauge road to see it and to find out its condition?

A. I don't *no*, sir.

366 X Q. 36. Is it not your recollection that you heard either Preston or McHenry say that they had gone up or were going up about that time?

Counsel for the complainants object to the question as leading.

A. It is not. I can't remember those things.

X Q. 37. Is it not the best of your recollection that either Mr. Preston or McHenry told you that they were going up to look at that road or had gone up?

A. They never told me.

X Q. 38. Did you hear any talk by them about the time they got the bonds, in the settlement of that matter from Mr. Harper, that they had gone or were to go; either of them?

A. I don't remember anything about it. I remember the bonds, and that is all I do know. I was not present.

X Q. 39. Were you present when the bonds were brought there or delivered?

A. I think not.

367 J. W. PRESTON recalled.

Examination by Mr. RIDDLE:

Q. 1. Have you read the testimony of Mr. Harper, one of the witnesses in this case?

A. Yes, sir.

Q. 2. State what took place, Mr. Preston, at the interviews you had with Mr. Harper in regard to the matters which led up to the contract of October 12, 1881, and who were present at those conversations, the substance of what was said at them, and what you did in connection with them, giving the language as near as you can, and when they took place or about when.

A. In September or October, 1881, E. L. Harper became indebted to the firms of J. W. Preston and Co. and Preston and McHenry to the extent of some two hundred and thirty-odd thousand dollars. I could not tell you the exact amount. Mr. McHenry and myself came down to Cincinnati to try and effect a settlement with Mr. Harper. After various interviews with Mr. Harper, at which Mr. Wilshire was always present—I think there may have been once or twice that he was not, but almost universally he was with *with* us. The matter was talked over in various ways and finally Mr. Harper made a proposition through Mr. Wilshire to us that he had a narrow-gauge railroad some twenty miles in length here in the

368 State of Ohio, and he thought we could make some dicker whereby we could settle the account by the purchase of that road.

Q. 3. Give it to you?

A. If we would take that road as it was he would turn it over to

us in payment of this indebtedness. He thought that the road could be bonded for twenty thousand dollars a mile. Other roads were bonded at that rate and this road he had just bought for a certain sum of money. He may have said that he could sell it for something more than he gave for it. I don't remember the amount or anything further than that the property was worth more than he had paid for it. After some talk with him in regard to it and with Mr. Wilshire with regard to the property, the kind of property or the possible value of it, and a consultation with another party here, Mr. McHenry and I decided that we would go up to Waynesville, near the western terminus of the road, and see some parties there in regard to it. We went to Waynesville and consulted with Israel Wright, who was once vice-president of the road, had once been an officer and concerned in the building of it. He introduced us to a gentleman by a name I don't know. He was a banker. After talking with this gentleman with regard to the property, without seeing it at all we decided that it was not worth while for us to entertain the proposition at all, and came back and so reported to Mr. Harper. This proposition was
369 then made to extend the road with the Little Miami on the west and the Ohio Southern on the east, making an extension of eight miles, I think, or a little more.

By Mr. BOYDE:

Q. 4. Made by whom you had better state.

A. Made by Mr. Harper and to make the road a standard gauge, on which he would issue twenty thousand dollars of first-mortgage bonds, twenty thousand dollars of second-mortgage bonds, and twenty thousand dollars of stock on each mile of the road, twenty thousand dollars of income bonds instead of second-mortgage bonds. After some time some days, perhaps, of dickering on the matter we finally accepted that proposition, and the contract was drawn on the 12th day of October.

Q. 5. Now, what was said, if anything, by you or by Mr. Harper in any conversations prior to the execution of the contract marked Exhibit A of the testimony in this case in regard to the question of stock in the corporation which Mr. Harper undertook to cause to be organized in that agreement, as near as you can recollect?

A. Before this contract was made the agreement or the proposition from Mr. Harper was that he should organize a railroad company under the laws of the State of Ohio, and proceed then to change the gauge of this road and extend it, issuing the bonds and the stock. He proposed to us that if we would take stock in the road he
370 would be glad to have us do it, and would make us officers of the road as a sort of inducement. I told Mr. Harper that I didn't want any stock in the road; that under the laws of the State of Ohio I didn't choose to make myself responsible as a stockholder, knowing the stringency of the local law in regard to stock corporations in this State.

Q. 6. Was anything stated at any of these conversations in rela-

tion to Mr. Harper becoming a subscriber to the capital stock of his proposed railroad company?

Counsel for the defendants object to the question as leading.

A. Nothing whatever.

Q. 7. Was the subject discussed at all between you?

A. No, sir.

Q. 8. Never at any time?

A. No.

Q. 9. Nothing was ever said between you in regard to the stock except that Mr. Harper proposed to give you stock, which you declined to take?

A. That is all; he simply proposed to organize the railroad company under the laws of Ohio without reference to his being one of the stockholders at all.

Q. 10. When did you first know that Mr. Harper was a stockholder or a subscriber to the capital stock of the proposed corporation?

371 A. Not until after the road had gone into the hands of a receiver and we had access to the books of the company.

Q. 11. Was any proposition ever made to you by anybody at any time referring to the question of your releasing Mr. Harper from any liability upon his subscription to the capital stock of the proposed corporation?

A. No, sir.

Q. 12. Did you ever discuss it with Mr. Harper?

A. No.

Q. 13. Or anybody else?

A. No, sir.

Q. 14. Did you ever agree, directly or indirectly, that any subscriptions were to be paid by stock subscriptions for stock, or was it ever discussed between any parties to this suit, so far as you know, as to whether the subscription made by Mr. Harper to this company should not be paid for?

A. No, sir.

Q. 15. Since you have testified in chief you have read the testimony of Mr. Gahr, one of the witnesses produced by the defendants, have you not?

A. Yes, sir.

Q. 16. Now, I wish to ask you, after reading that testimony of that witness, to describe where the conversations between Mr. Wilshire, McHenry, and yourself and Mr. Harper took place and in

372 what sort of a room or inclosure the conversations where carried on.

A. Every interview that we had with Mr. Harper in regard to this business was in his back office, a large, deep room in the rear of the office of the Swifts iron and steel works.

Q. 17. On the same floor?

A. On the same floor; there was a high partition; I don't know whether it went to the ceiling or not, but there was a high partition between that and the front office; the room was dark; was sparely

furnished; there was one desk in the room that stood near the one window in the room; there might have been two, but they were close together if *they* were.

Q. 18. Was any person in that room during the preliminary conversation leading up to the contract of October 12th, 1881?

A. No; no one was present at these interviews except Mr. Wilshire, Mr. McHenry, Mr. Harper, and myself, and a part of the time Mr. Harper's brother, W. H. Harper.

Q. 19. Was he there enough of the time to be familiar with the continuous conversations between you? Wm. H. Harper I refer to.

A. Well, hardly, I think, although he was there a good deal of the time, coming and going; he would be there sometimes quite a long time; then he was not there at all.

Q. 20. Who drew the contract of October 12, 1881—I mean what lawyer?

373 A. The final contract was drawn by Alexander E. Ferguson.

Q. 21. What was done with that contract before it was signed?

A. Mr. Harper took the contract, I think, and read it over, or it might have been read to him.

Q. 22. Where was he?

A. In the back office.

Q. 23. In the same place?

A. Yes, sir; at the office of the Swifts iron and steel works. I say I think he looked the contract over or it was read to him. He then says: "I want to take it and show it to my attorney."

Q. 24. Well, what did he do then?

A. He took the contract; went out with it; returned in the course of fifteen or twenty minutes, perhaps less, and said it was all right, and that we would make the necessary copies of the contract and execute it, which was done by some young man in Harper's office and was executed shortly after. I can't tell whether that same evening or the next day.

Q. 25. Where was this copy made?

A. I think they were all made in Mr. Harper's office.

Q. 26. In the back office where you were?

A. No, sir; in the front office they were made.

Q. 27. Was Mr. Gahr present at this conversation between you and him?

A. He was not.

374 Q. 28. What office did Mr. Gahr, so far as you know, perform, if any, in regard to the contract of Oct. 12, 1881?

A. If he performed any office he copied it. I was not personally acquainted with Mr. Gahr.

Q. 29. When the copy was signed by the various parties was anybody called in to witness it?

A. Yes, sir; two parties were called in to witness it, one of whom, I think, was Mr. Gahr.

Q. 30. Where was it signed?

A. It was signed in this same back office that I have spoken of before.

Q. 31. And the witnesses were called in there to witness their signatures as such?

A. Yes, sir.

Q. 32. How often were you in Cincinnati between the 12th of October, 1881, when the contract was executed, and the day of the delivery to you of the bonds provided for by that contract, on the 11th day of February, 1882?

A. Between October, 1881, and February 12, 1882, I was here two or three times; I think, possibly, three times during that writer.

Q. 33. Did you have any interview with Mr. Harper during that time touching any of these matters?

A. I called at Mr. Harper's office twice, I think, during that time.

375 Q. 34. What took place?

A. It was just an ordinary conversation in regard to what progress was being made with the road and what the prospects of it were. He was claiming all the time that he was making arrangement with other parties whereby the road was to be extended. He had made — with the Standard Coal and Iron Co. of Columbus, who were Boston parties, in which they were going to extend this road down to the coal-fields and make a great deal of traffic for the company and make it a good property. We had casual conversations in regard to that road, as to what it would be.

Q. 35. You have heard Mr. Harper testify that he had an offer of seventy-five thousand dollars from somebody for that old twenty miles of narrow-gauge road. When did you first know, if you know, about that? And state whether he communicated that fact to you prior to the execution of the contract of October 12, 1881.

A. Oh, he may have said something in regard to his being able to sell the property for more than *he* bought it for, but I remember of *the* no specific conversation in which he claimed to have any contract. It might have been that conversation, possibly.

By Mr. BOYD:

Q. 36. When did you first learn, Mr. Preston, of the propo-
376 sition made by Mr. Harper to this railroad corporation that he got up for the conveyance of the railroad to the corporation and the terms of his proposition generally—the proposition Exhibit C—the proposition of Mr. Harper to the board of directors to build the road?

A. After the road went into the hands of the receiver. I can't tell what time it was.

Mr. RIDDLE: You never heard of it before that time?

A. No, sir.

By Mr. BOYD:

Q. 37. Did you ever, directly or indirectly, agree to that proposition and the acceptance of it?

A. I did not. I never had any knowledge of it.

Cross-examination by Mr. JORDAN:

X Q. 38. What is your recollection that Mr. Harper said to you that he had paid for that road? Was it not, as he had stated in his testimony, about sixty-five thousand dollars?

A. I think so.

X Q. 39. Is it not true that he did state to you at or about the same time that he had an offer for a larger amount than that for it? Is not that the best of your recollection?

A. I think it is quite possible that he did.

X Q. 40. Without your being able to fix the exact amount or from whom the offer was made?

A. Yes, sir.

377 X Q. 41. At what time was it that you went up to examine into the condition of the narrow-gauge road?

A. It was somewhere between the 6th and 12th of October, 1881.

X Q. 42. Who went with you?

A. Mr. McHenry.

X Q. 43. What did you go for?

A. We went to ascertain, if possible, the value of this property—whether it had any value or not.

X Q. 44. Whom did you see in order to obtain information on that subject and talk to?

A. I met Mr. Isreal Wright, whom I had known before, and he introduced me to another gentleman, whose name I can't remember, who had a small banking-house there.

X Q. 45. Was his name Haines.

A. It was a name of one syllable. It may have been Haines. I don't remember his name.

X Q. 46. Do you remember whether he was the same man who had something to do with the construction of the Wilmington narrow-gauge railroad?

A. Well, he has something to — with the construction of narrow-gauge railroads, possibly in this same connection—something to do with narrow-gague railroads, at any rate.

X Q. 47. You asked them about this road & about its value?

A. Yes, sir.

378 *A. Yes, sir.*

X Q. 48. How far were you then from this road? I mean how near to the road did you get?

A. Some 6 or 7 miles to New Burlington.

X Q. 49. You and Mr. McHenry preferred to ask strangers what its value was or what it was not, and from what you could learn from others, rather that to trust yourselves?

A. Yes, sir.

X Q. 50. I will ask you whether you went at any other time before the bonds were obtained by you in settlement of this contract which you had made with Mr. Harper to look at the road before you took the bonds.

A. A few days before the expiration of the time, I think only two days before, I tried to go over the road. I went from Xenia to

Allentown. The track was not laid between Allentown and Jeffersonville, except part of the way. I took a buggy and went from Allentown to Jeffersonville, as near the road as I could—the grading. I think the ties mainly were laid, and they were laying the track part of the way over towards the Jeffersonville end. They had then got the locomotive onto a side track at Jeffersonville the day before.

X Q. 51. Then you had gone over and examined the road before you took the bonds?

A. So far as I have stated.

X Q. 52. Nobody prevented you from making a more com-
379 plete investigation than you did? You had every opportunity afforded you, had you not?

A. I had no opportunity of going over the road except as it was gone over.

X Q. 53. Nobody prevented you doing that?

A. No, sir.

X Q. 54. You knew the condition of the road at the time you took the bonds?

A. Yes, sir.

X Q. 55. Was Mr. McHenry with you at that time?

A. No, sir.

X Q. 56. Where was Mr. McHenry when you made this effort to examine the road?

A. In New York, my impression is.

X Q. 57. Was he not over it before the bonds were delivered?

A. Yes, sir.

X Q. 58. You saw him before the delivery of the bonds?

A. Yes, sir.

X Q. 59. You talked with him about the condition of the road?

A. Yes, sir.

X Q. 60. You told him what you had seen or found out about it?

A. Yes, sir.

X Q. 61. Being in that condition, you told him so so that he knew what he was about as well as you did?

A. Yes, sir.

380 X Q. 62. I will ask you further where you were and where Mr. McHenry was at the time the bonds were accepted.

A. In the office of Howard Eckert and Company.

X Q. 63. From whom did you receive them and from whom did Mr. McHenry receive them?

A. From Mr. Harper.

X Q. 64. Mr. Harper was there, was he?

A. Yes, sir.

X Q. 65. Did you sign that receipt shown here in evidence?

A. Yes, sir.

X Q. 66. In settlement of all claims against Mr. Harper under that contract?

A. Yes, sir.

X Q. 67. You knew what you were about when you did that?

A. Yes, sir.

X Q. 68. Now, I will ask you whether you had seen these bonds at any time before you were here at the time you received them.

A. No, sir.

X Q. 69. Had you seen any forms of the bonds before?

A. No, sir.

X Q. 70. From the time that you got your bonds, did you keep your portion of them?

A. I kept a part of them.

X Q. 71. In your possession?

A. Yes, sir.

X Q. 72. How many bonds did you get?

Mr. RIDDLE: The contract shows.

381 My. JORDAN: You can state about how many. Do you know your proportion, about, in round figures?

A. I can't state it correctly.

X Q. 73. Was it 50 or 60 thousand dollars?

A. Yes; it was more than that.

X Q. 74. How many of these bonds did you keep in your possession and retain?

A. Fifty-odd thousand dollars.

X Q. 75. To whom were those bonds made payable?

A. To the Union Trust Company or bearer.

X Q. 76. Did you read the bonds?

A. Yes, sir.

X Q. 77. You knew what the contents of the bonds were, then?

A. I knew that they were ordinary railroad bonds.

X Q. 78. You read them and knew the contents?

A. I don't know whether I read the bonds entirely through or not. I think likely I did.

X Q. 79. I understand you to say that Mr. Harper offered you stock in the railroad, you and Mr. McHenry?

A. He did.

X Q. 81. Well, then, was he expecting at that time to make you a present of the stock, or how did you understand it?

A. His proposition was to include a certain amount of the stock of the road in this contract and we declined it.

X Q 82. Was that what you refer to when he said you could be officers of the road?

382 A. I don't understand the question.

X Q. 83. I understood you in one of your answers to a question by Mr. Riddle to say that he said that you could take some stock, and that you and Mr. McHenry could become officers of the road, and I want to know whether that stock that he was then speaking about letting you have was stock that was to be presented to you, or that you were to hold nominally or take as part consideration of the settlement.

A. Well, it was to be in part consideration of the settlement. We didn't consider the stock of any value, as of any consideration at all.

X Q. 84. You didn't regard the stock of this road as worth anything?

A. No, sir.

X Q. 85. Either before or after the settlement?

A. No.

X Q. 86. Now, I understand you to say that you saw some books and papers after this road went into the receivers' hands from which you obtained certain information?

A. Yes, sir.

X Q 87. There was nothing said by Mr. Harper in this negotiation as to the amount of stock that would be taken by any parties who became subscribers to the capital stock of the road, was there?

A. No, sir.

X Q. 88. He didn't tell you that he would take two hun-
383 dred and fifty thousand dollars or any other amount of the capital stock of that road, did he?

A. No, sir.

X Q. 89. You didn't inquire afterwards whether he had or not?

A. No, sir.

X Q. 90. You paid no attention as to what subscriptions had been made to the road?

A. No, sir. I had no right to inquire.

X Q. 91. You made no inquiry of him or investigation on that subject?

A. No, sir.

X Q. 92. You didn't go to anybody to see whether the capital stock of the road was ten or twenty thousand dollars or how much, did you?

A. No, sir.

X Q. 93. You didn't ask Mr. Harper how much he had subscribed to the capital stock of that road at any time?

A. No, sir.

X Q. 95. You didn't request anybody else to investigate that subject, did you, or make any inquiries for you?

A. No, sir; I didn't, because I expected from Mr. Harper's conversation up to that time that he was going to make improvements and arrangements with other parties; that the bonds
384 themselves would be worth somewheres near the money be owed them.

X Q. 96. You knew the condition of the road at the time you received the bonds?

A. I knew the road was not entirely finished according to the contract.

X Q. 97. And you knew all about it, as much as a man in your situation could know?

A. I knew as much as a man in my situation could know from the day that I saw the man at Gimperling's headquarters, who was manager—I supposed president—manager of the road and talked to me in regard to it, and he told me as an officer of the road and the manager of it that the weather had been such during the winter that it was impossible for him to get the road completed on the

day it was to be done, but he would assure me as an officer of the road and as the manager of the road that the road should be completely finished, completely balasted, and put in first-class order, and that I might depend upon his assurances that it should be done. On his statement to that effect, which I made to Mr. McHenry and to Mr. W-lshire and others who were interested in it, we accepted those bonds.

X Q. 98. Mr. Harper didn't make these statements to you, did he?

A. I am not certain but that Mr. Harper did make the statements.

385 X Q. 99. Did he or Mr. Gimperling?

A. I have said that Mr. Gimperling made the statements, because I went personally to see him. I supposed him to be the man having that particular matter in charge personally.

X Q. 100. Was Mr. Harper present?

A. No, sir.

X Q. 101. Now, I will ask you to state further in regard to this road—to state whether you had any conversation at any time, but not at the office of Mr. Harper, with him in regard to these matters.

Mr. RIDDLE: In regard to what matters?

Mr. JORDAN: In regard to the matters connected with the settlement between Mr. Preston and him.

The WITNESS: At what time?

Mr. JORDAN: At any time prior to the date of October 12th, 1881.

A. I had conversations with Mr. Harper after the settlement was made, and the work of changing the gauge and extending the road was going on when I was at Cincinnati and would call at his office.

X Q. 102. What did you call to see him for during that time?

A. Because I wanted to know how the work was going on and if it was going to be in shape for him to carry out the terms of the contract made in October.

X Q. 103. Had you been up to Dayton at any time between
386 the time of the making of the contract and the completion of the road, about the time you got the bonds?

A. I only went to Dayton once; it was before I got the bonds.

X Q. 104. You had seen Mr. Harper several times in the meantime in Cincinnati?

A. Yes, sir.

X Q. 105. What did you say to Mr. Harper when you saw him here?

A. I would ask him how the road was going on and what he was doing—how the work was progressing.

X Q. 106. What did he say?

A. That it was being pushed as rapidly as possible, and he expected to have it done in time and well done.

X Q. 107. You knew Mr. G-mperling?

A. I had met him and been introduced to him in Mr. Harper's office. I was not well acquainted with him.

X Q. 108. You knew that he was the man carrying on this road?

A. I was told so by Mr. Harper.

X Q. 109. What did Mr. Harper tell you he was doing?

A. That he was attending to this work under this contract.

X Q. 110. That he had agreed to do it?

A. He told me that Mr. Gimperling was attending to the work under this contract and prosecuting the chang-s he made in the road.

X Q. 111. And he told you that it was all going on all
387 right, did he?

A. Yes, sir.

X Q. 112. You went to Mr. Harper to get that information, did you?

A. Yes, sir.

X Q. 113. Now, then, you had several such interviews as that with Mr. Harper?

A. I had 2 or 3 of them. I don't think I was in his office more than twice that winter.

X Q. 114. Did you ask Mr. Harper whether he had organized the road as he had agreed to in that contract?

Counsel for the complainants object to the question because it does not state what contract.

A. I presume likely I did.

X Q. 115. What do you recollect about it?

A. I have no recollection about it at all.

X Q. 115½. Do you remember whether you did or not ask Mr. Harper whether he had caused this corporation to be organized as he had agreed?

A. I have no distinct recollection in regard to it.

X Q. 116. Do you recollect whether he had made a conveyance to the new company or not?

A. I have no recollection of asking such a question.

X Q. 117. You asked him how it was getting along?

A. I asked him how the work was progressing on the road, taking it for granted that he would not have gone on with the work
388 without having organized the company, as he had agreed to do.

X Q. 118. Now, you understood that Mr. Harper was to furnish the money to build that road?

A. I knew nothing about it, except he was to carry out the terms of the October contract.

X Q. 119. Did you expect him to furnish the money to build that road?

A. I presumed he would.

X Q. 120. So if he did furnish the money he did what you expected of him?

A. That was the contract.

X Q. 122. Where did you expect him to get the bonds from?

A. I expected them to be issued by the railroad Co.

X Q. 123. Why did you expect them to be issued by the railroad Co.?

A. I don't know. He had made an agreement with us in this contract of October 12, 1881, to organize this company and on the 12th of February, 1882, was to deliver to us a certain amount of the bonds of this railroad company. It was not for me to inquire where he got them. He was to furnish them to us.

X Q. 124. You expected the railroad Co. to deliver them to him?

A. I didn't expect anything about it.

X Q. 125. Did you know that he was the whole owner of the road that he was to transfer?

A. I knew that he was the owner of the narrow-gauge road.

X Q. 126. The whole of it?

389 A. I knew he said he was.

X Q. 127. Was it not your understanding that if he built the road he would own the bonds and stock of the road?

Counsel for the complainants object to the question.

Mr. JORDAN: I object to these gentlemen making statements here for the purpose of making objections.

Mr. RIDDLE: We don't want the witness' understanding.

Mr. JORDAN: This being a cross-examination of the witness, the counsel for the complainants knows that we have a right to the understanding of the witness.

X Q. 129. Question repeated as follows: I will ask you if he was the owner of the road and was to advance the money to widen and extend it. Did you not understand that he was to be the *wo*ner of the road and the securities?

A. I would suppose that the parties who subscribed to the stock would be the owners of the road.

X Q. 130. Did you inquire who had subscribed? Did you pay any attention to that matter?

A. No, sir.

X Q. 131. Did you ask anybody about that?

A. No, sir.

X Q. 132. You paid no attention to that, and didn't rely upon that, but relied upon the question as to what he had agreed to give you?

—. ——.

X Q. 133. I will ask you to state whether you know Mr. Gahr?

390 A. I do not.

X Q. 134. Did you ever see him?

A. I saw a gentleman that I supposed to be Mr. Gahr, because he signs his name as a witness to that contract as Gahr. He was a young man in Mr. Harper's office. I was never introduced to him and never knew what his name was until I saw him sign it.

X Q. 135. When this contract was taken down to Mr. Harper's office who had the contract as drawn up by Mr. Ferguson?

A. I can't tell you who carried it.

X Q. 136. Did you carry it down or who?

A. Mr. Wilshire, Mr. McHenry, or myself.

X Q. 137. Do you remember which one took the contract down there?

A. I do not.

X Q. 138. Who did you find when you went there?

A. Mr. Harper.

X Q. 139. Who else?

A. I could not tell you, except the clerks.

X Q. 140. Do you recollect what time of the day it was when you went down there?

A. Between 3 and 4 o'clock in the afternoon.

X Q. 141. You found Mr. Gahr there?

A. I didn't know Mr. Gahr.

X Q. 142. But you told us awhile ago that this paper was handed to Mr. Gahr to copy, did you not?

A. I told you it was handed to a young man whom I supposed was Mr. Gahr.

X Q. 143. You now know that it was Mr. Gahr?

391 A. I do not.

X Q. 144. Was it the same young man that signed as a witness?

A. Yes, sir.

X Q. 145. Who handed the paper to the witness to copy?

A. Mr. Harper.

X Q. 146. Did you remain until it was copied or not? What is your recollection about that?

A. I can't tell you.

X Q. 147. What is your best recollection?

A. It seems to me that I did.

X Q. 148. The best of your recollection is that you or Mr. Wilshire remained there until Mr. Gahr copied the contract?

A. Yes, sir.

X Q. 149. Now, don't you know that there were three copies prepared—that it was prepared in triplicate?

A. Yes, sir.

X Q. 150. It is six or seven pages long, is it not?

A. Yes, sir.

X Q. 151. How long would it take to copy these papers?

A. He did it very rapidly.

X Q. 152. An hour or more?

A. Yes, sir.

X Q. 153. Did you remain there an hour or more?

A. I presume we did.

X Q. 154. Were you not talking more or less of the time?

A. Yes, sir.

X Q. 155. Do you remember the subject you were talking

392 about?

A. I think about this railroad.

X Q. 156. And you had plenty of time, then, to talk with Mr. Harper as to how he was going to widen and extend the railroad, had you not?

A. Yes, sir.

X Q. 157. You conversed as to the mode in which he intended to organize the next road, did you not?

A. The conversation in regard to organizing the new road was simply about organizing it as a railroad company under the laws of the State of Ohio.

X Q. 158. Did you not continue to talk about that during the time these copies were directed to be prepared?

A. I don't think we talked about that subject very much.

X Q. 159. Don't you think that you did?

A. I don't think it is impossible.

X Q. 151. It would not have taken you an hour or half an hour to have had Mr. Harper state that he was to organize the road under the laws of Ohio?

A. No, sir.

X Q. 152. Now, did you not have, at that time, a general conversation of this sort that it would be done at that time?

A. Yes, we did.

X Q. 153. Did you not all talk about it?

A. Yes, we did.

X Q. 154. Do you recollect talking about how the bonds should be issued?

393 A. I don't remember any specific conversation as to the manner in which the bonds should be issued. They were to be issued by the corporation which was to be organized—issued as ordinary railway bonds are issued. The contract stated how much per mile. We talked it over before.

X Q. 155. What was said about that time or before whether a new corporation should be organized instead of taking the old one?

A. I don't remember, except Mr. Harper thought he wanted to change the name, and the old corporation was all broken up and he wanted a new organization.

X Q. 156. Now, then, Mr. Gahr must have been present, according to your best recollection, at this one single time at least an hour or more with you and Mr. McHenry during the whole period of time that he was drawing three or four papers.

A. I think very likely that he was there an hour.

Question re-read to the witness, who says: I didn't understand that question. Mr. Gahr was not present. He didn't copy the contract in the room where we were. They were copied in the front office. Mr. Gahr was not present at that time.

X Q. 157. Did you see Mr. Gahr copy them?

A. No, sir.

X Q. 158. Is not this the fact: that you went there that afternoon, and that Mr. Gahr copied the contract during that evening or night,

394 and that you parties went down there the next morning and signed the papers, and that you didn't know anything about Mr. Gahr drawing the papers, except that they were drawn in the manner stated?

A. The contract was signed in the evening. It was signed by gaslight.

X Q. 159. Now, then, was it not the next evening after that day? Didn't it take the better part of a day to *to* draw them?

A. No, sir; I think the contracts were copied the same evening.

X Q. 160. Then, would not your recollection be that you must have been down there 3 or 4 hours?

A. I have no recollection about it. It was a matter of slight importance, and it has not made an impression on my mind to last three or four years.

X Q. 161. You have no better recollection as to what was said at that time except the length of time it would take?

A. I told you that the burthen of the conversation while we were sitting there at that time was in regard to the future of this railroad. Mr. Harper was telling us what he had in the right of way beyond Jeffersonville to Mt. Sterling; what a great outcome from this property if this road was extended. He elaborated on it from time to time.

X Q. 162. You all took part in the conversation, but what was said by each of you you don't remember?

A. No, sir; except in a general way.

X Q. 163. By the arrangement between Mr. Harper and you gentlemen, what were the amount of bonds to be issued per
395 mile on this road?

Counsel for the complainants object to the question because the contract itself shows.

A. Twenty thousand dollars per mile of first mortgage, twenty thousand per mile on income bonds, and twenty thousand per mile of stock according to the terms of the contract of October 12th, 1881.

X Q. 164. What were you and these other gentlemen to be paid under the arrangement you had with Mr. Harper?

A. I can't tell you the amount. The contract shows.

X Q. 165. I don't mean the amount. You don't remember how much you were all paid?

A. I don't remember.

X Q. 166. Were you to take the first-mortgage bonds at par or take what stock and at what price were you to take the second-mortgage bonds, or were they to be presented to you? Were you to take the 1st-mortgage bonds at par, and in addition to that were you to have fifty per cent. of the income bonds, according to the terms of that contract? Now, when Mr. Harper offered in addition to that stock, was that as a present?

A. Well, I didn't so look upon it any more than I looked upon the fifty per cent. of the income bonds as a present.

X Q. 167. Did you look upon the offer of the income bonds as a present?

A. No, sir; I looked upon it that Mr. Harper didn't consider the bonds to be worth par.

X Q. 168. And you were willing to take the stock?

A. And we were willing to take the stock.

396 X Q. 169. And you thought nothing of the kind at the

time you were making these transactions with Mr. Harper, by which he was to willing to give you twenty thousand dollars a mile of the income bonds? You thought he had in his mind that he was to have mortgage bonds that were not worth par?

A. I presume so.

X Q. 170. That is your opinion?

A. That is my opinion.

X Q. 171. What did you think they were worth at the time you took them?

A. It was absolutely and utterly impossible to form an opinion of that kind.

X Q. 172. About what did you think they were worth at that time?

A. I thought it would be very fortunate if they were worth fifty cents.

X Q. 173. You were speaking of the time you made the contract with Mr. Harper?

A. Yes, sir.

X Q. 174. You are speaking of the first-mortgage bonds?

A. Yes, sir.

Redirect examination by Mr. RIDDLE:

X Q. 175. You said in answer to a question by Mr. Jordan, relating to the arrangement between you and Mr. Harper, that, according to that arrangement, there were to be twenty thousand first mortgage, twenty thousand income, and twenty thousand stock issued. I will ask you to state whether that was the agree-
397 ment of Oct. 12, 1881; whether any stock was to be issued according to that; what do you mean by your answer.

Counsel for the defendants object to the question and the question re-read at the request of the witness.

A. I am not certain about the contract mentioning twenty thousand dollars per mile of stock. It was understood in the conversation with Mr. Harper that that was to be the amount of stock issued upon the road. I made an answer there previously; before looking at the contract at the last part of the answer it says according to the contract of October 12th.

Q. 176. Was no stock to be issued according to that contract?

A. None to us; no, sir.

Q. 177. Well, to anybody?

A. I don't remember.

Q. 178. How long has it been since you have read that contract?

A. I have not read in three years entirely.

Recross-examination by Mr. JORDAN:

Q. 179. But whether twenty thousand per mile is stated in the contract or not, that was the amount of stock that Mr. Harper said would be issued on the road?

A. Yes, sir.

398 Redirect examination by Mr. RIDDLE:

Q. 180. That was in the conversation held before the contract of October 12, 1881?

Counsel for the defendants object to the question as undertaking to lead the witness.

Mr. RIDDLE: I move to strike out the question.
Mr. JORDAN: You can't strike it out now.

A. Yes, sir; with Mr. Harper.
Q. 181. What was the contract of October 12, 1881, as representing the agreement between you and Harper? Was it the whole of it—the whole of the agreement?

Counsel for the defendants object to the question as leading.

A. Yes, sir.

WM. E. MCHENRY recalled.

Examination by Mr. RIDDLE:

Q. 1. Have you read the testimony of Mr. Harper in this case?
A. Yes, sir.
Q. 2. Will you state, Mr. McHenry, what occurred between you and Mr. Harper and Mr. Wilshire previous to the execution of the contract of October 12, 1881, or at the time of the execution of that contract, and what, in fact, that contract was in the light of having read Mr. Harper's testimony?

399 A. During the year 1881 I was a commission merchant in the city of Chicago. I did a great deal of business for Mr. Harper, in which I made him a great deal of money.

Counsel for the defendants object to the answer and move to strike it out.

Mr. RIDDLE: I don't want you to go into that. I want you to come down to Oct. 12, 1881. I want to know what took place at the conversations after your failure when you came down here to get your money from Mr. Harper.
A. In the course of several interviews with Mr. Harper, in which were present Mr. Preston, Mr. J. W. Wilshire, Mr. E. L. Harper, and myself, we endeavored to make a settlement of our claims against Mr. Harper. The first proposition we had from him was to turn over to us a narrow-gauge railroad in Ohio for the full amount of our debt, which we refused.
Q. —. Then what proposition was made to you?
A. We had several conferences, and, finally, a proposition was made by Mr. Harper to take the narrow-gauge railroad and cause a company to be organized under the laws of Ohio, the gauge of the road widened and extended to Jeffersonville, on the Ohio Southern, and Claysville, on the Little Miami, or at or near Corwin, called Claysville Junction now. All these conversations and conferences

between the parties I have referred to finally resulted in a
400 contract being drawn, which is known in this case as Exhibit A, and dated October 12, 1881.

Q. 4. Now, was there anything agreed upon at that time as to the capital stock of the corporation required of him to be organized? If so, what was it or what occurred? What occurred at the conversations leading up to that contract of October 12, 1881, in regard to the stock in any corporation? What was the conversation on that subject?

A. There never was, to my knowledge, any conversation whatever on the subject of stock, except that Mr. Harper wanted us to take some of the stock in the road, which we refused on the ground of the stock liability in the State of Ohio.

Q. 5. Was the question of the subscription of Mr. Harper to the capital stock of the corporation proposed to be organized discussed at these conversations?

Counsel for the defendants object to the question as leading.

A. The subject never was mentioned.

Q. 6. When did you first know that Mr. Harper had subscribed to the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Company?

A. At the time that we had access to the books of the company after the road went into the hands of the receiver.

401 Q. 7. Did you ever have any talk with Mr. Harper touching his subscription to the capital stock of that corporation?

A. None whatever.

Q. 8. At any time?

A. Never.

Q. 9. Did you ever have any agreement with Mr. Harper or did you ever have any conversation with Mr. Harper in which it was agreed that he should have the capital stock of said corporation and the bonds of the corporation for the road?

Counsel for the defendants object to the form of the question; that it is leading, &c.

A. None whatever.

Q. 10. Do you recollect what Mr. Harper swears on that subject?

A. My recollection of Mr. Harper's testimony on that subject is that he swears that he was to have all the bonds and stock of the road for it.

Q. —. For the road?

A. For the road.

Q. 12. What have you to say in regard to that testimony?

A. I think Mr. Harper is mistaken on the subject.

Q. 13. Did you ever have any such understanding with him?

Counsel for the defendants object to the question on the grounds that it is leading their own witness, and that we don't want the understanding of the witness.

402 A. None whatever.

Q. 14. Did you ever have any conversation with him leading up to that subject?

A. None whatever.

Q. 15. At no time?

A. At no time.

Q. 16. When did you first learn that Mr. Harper had made a written proposition to the Cincinnati, Columbus and Hocking Valley Railway Co., which proposition is in evidence as part of Exhibit C, the minutes of the company?

A. At the same time that I saw the book containing his subscription to the capital stock after the road went *went* into the hands of the receiver and I had access to them.

Q. 17. I will ask you to describe the place in Mr. Harper's office where these conversations took place and who were present.

A. They took place in the rear office of the Swifts iron and steel works. I don't know as I know what the number is. I suppose that designates it sufficiently.

Q. 18. What sort of a room was it?

A. Quite a large room, partitioned off from the front office by a partition which went clear to the ceiling or nearly so.

Q. 19. Who were present?

403 A. Mr. Harper, Mr. Wilshire, meself, and W. H. Harper was in and out. I don't think he was present continuously at any one conversation.

Q. 20. Was the room cut off from the front part of the office?

A. Entirely so.

Q. 21. Do you know one Gahr or have you ever seen him?

A. I have seen him. I don't know that I would know him if I saw him again.

Q. 22. Was he present at any of the conversations that led up to the contract of October 12, 1881?

A. No, sir.

Q. 23. Or at any of the conversations that took place about that time?

A. No, sir.

Cross-examination waived.

1. It is agreed that either side may put in one of the first-mortgage bonds.

2. That the complainants may offer the contract of settlement between Messrs. McHenry and Preston or Preston and McHenry and their various creditors by which Preston & McHenry transferred certain bonds of the Railway Co., defendant, in payment of certain obligations due by Preston & McHenry to their creditors, provided this has legally been done, subject to legal objections, but time for the offering is waived by the defendants.

Adjourned until further notice.

404 1886, JANUARY 30TH.

The parties met for the purpose of taking further testimony in this case.

Present: John W. Warrington and W. F. Boyd, on behalf of the complainants, and Judge Jordan, on behalf of the defendants.

THOMAS HANNA, of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Examination by Mr. WARRINGTON:

Q. 1. You are the receiver of the Cincinnati, Columbus and Hocking Valley Railway Co. and was originally the special master commissioner to sell the road?

A. Yes, sir.

Q. 2. What efforts, if any, have you made either as receiver or special master commissioner in the case of the Union Trust Co. of New York against the Cincinnati, Columbus and Hocking Valley Railway Co. to sell all of the property, real, personal, and mixed, of the company?

A. Well, I advertised it twice for sale. Once it was put off. You don't care anything about that first time. I advertised the road last June, I think. I made three insertions in the New York World and three in the Cincinnati Commercial, according to the decree, and on July 11, 1885, I attempted to auction the property off. There were no bidders there at the time. I got there a little late.

405 Mr. Harper had been there. I went to the telephone and told Mr. Harper that I was going to offer the property—I sent word through the telephone. One of the clerks came to the telephone. They sent word back to go ahead. I waited a reasonable time for him to come, but he didn't, and I offered it for sale. There was no bidder there except Mr. Riddle, who made a conditional bid—that is, he offered to buy the road in at twenty thousand dollars and for me to hold it open; that he didn't have the cash on hand according to the decree—so much cash as was necessary to put up—that he hadn't it; that he would bid it in that way and see if he could raise the money. He never did raise the money and there was no sale.

Q. 3. When did you take possession of the road as receiver of the company and in what condition did you find it?

A. I took possession of the road February 9th, I think; some time in February, 1884. The road when I took possession of it was being opera-ed by the I., B. & W. under a contract made with the former company, and that contract didn't expire until the following 1st of June or 31st of May.

Q. 4. Of 1884?

A. Of 1884. I then took possession of the road myself, attempted to. The road was in very bad condition. It hadn't any rolling

406 stock to operate it with, and I finally, not having any funds to operate it with, entered into a contract with one Jessy Kirk, who agreed to take the road and operate it in my name.

I don't know what kind of a contract you call it—the contract entered into. The court allowed it.

Q. 5. A contract that the court approved?

A. Yes, sir.

A Q. 6. Not in your name?

A. He was to operate it in the name of the receiver, I believe.

Q. 7. What was the physical condition of the road?

A. Well, it could hardly be considered a railroad. It was almost impracticable to run it. The track was in a very bad condition. There was nothing there to run it with. If it hadn't been for the Pennsylvania road lending us cars and an engine it would *would* have been impossible to run it at all.

Q. 8. Are you now referring to the rolling stock?

A. Yes, sir.

Q. 9. Laying that out of view, the question of the rolling stock, for a moment, what was the condition of the track?

A. It was in a very bad condition. It had been made a standard-gauge road with the material all being narrow-gauge stuff; the iron, except about one mile on this end and two or three on the other, and the ties were all narrow-gauge stuff.

Q. 10. What, if anything, happened to the cross-ties that
407 had been used while the road had been a narrow *guage*?

A. Do you mean what happened while it was a narrow *guage* or happened afterwards?

Q. 11. I refer to the narrow *guage* X ties that were used on the road as a standard *guage*.

A. to Q. 11. Do you mean what happened after it became a narrow-*guage* road?

Q. 12. Yes, sir.

A. I don't know as to the most of them, but a great many broke in the center—split right in two.

Q. 13. What —, if anything, in fact, has that had on the operation of the road?

A. Well, it has been so that half the time we could only carry about half a train—five or six cars on the track—because the rails separated and let us out into the ditch, and, besides that, you cannot run an engine over that road that has an ordinary cow-catcher on it.

Counsel for the defendants enters his objection to this testimony and moves to stricke it out, because he has no opportunity to rebut the statements about the broken ties.

Q. 14. Why did you say that you could not operate a locomotive with a cow-catcher?

A. Because it is too near the ground. It strikes these points sticking up in the middle of the track. These ties where they are broken in two we have been having the section hands chop them off.

Q. 15. How was the balasting of the road?

A. Well, there was only a small portion of the road balasted at all.

Q. 16. What do you mean by portion?

408 A. There is a portion of the road along where some of *of* the fills are made. Well, principally where the fills are made that the road is balasted. I don't know when it was done. The biggest part of that road runs through a flat country. After you get above Burlington four or five miles it is not ballasted. It is laid right on the dirt.

Q. 17. In what condition were the bridges?

A. The bridges were not in a bad condition, except that last year we had to put in some new timber. They have all been tightened up this year.

Q. 18. In the arrangement that was made between you and Mr. Kirk, by the approval of the court, in respect to operating the road what, if anything, was done in the way of an indemnity against expense or liability *in* your part?

Counsel for the defendants object to the question.

A. There were two contracts made. In both of them he gave me a bond or security for a thousand dollars.

Q. 19. Have you got those contracts and the bonds?

A. Yes, sir; I have the contracts and bonds. I kept the original. It was agreed in the entry that was made in court that he should give such a contract.

Q. 20. Will you furnish to the commissioner those contracts and bonds, to the end that copies of them may be attached as exhibits to your testimony marked "A, Hanna"?

Counsel for the defendants objects.

409 Q. 21. What, if any, income has the road yielded since you have had anything to *so* with it?

A. It has not yielded any income. In fact, it has taken all that it has been possible to make to keep the road going at all and — the bills for the last quarter—that is, the first term. We entered into two terms with Mr. Kirk. We acc*pe*ted the road on the 20th, or some time in January—the latter part of January—and didn't run it until the first of May, I believe, of 1885, and at the end, when we accepted it the first time, in January, there were outstanding debts, probably, of five or six hundred dollars, as near as I could learn, and then Mr. Kirk arranged to give us notes and securities for these things and fix them up, and I allowed him to take the road again on the 31st of May or 1st of June. Since that time he has had to make a good many improvements, put in some new ties and some new timber in the bridges, and he has spent a *d*ood deal of money, and he fixed up the engine at a cost of seven hundred dollars. At the present time, I suppose, the indebtedness — very nearly a thousand dollars.

Q. 22. What rolling stock does he use in operating it?

A. He uses the engine that belongs to the company and the baggage car. It is a combined baggage and mail car, and if you count the hand car as rolling stock he uses that and the five flat

cars when he has use for them. I don't expect he has use for them now.

410 Q. 23. Has there been any portion of the time during your connection with the road when it was operated only by means of a hand car; and, if so, for what purpose?

A. We operated the road from the time that Mr. Kirk stopped, in the latter part of January, 1885, into the early part of May, 1885, by the hand car for the purpose of keeping the contract with the Government to carry the mails.

Cross-examination by Judge JORDAN:

X Q. 24. You offered the road twice?

A. No, sir; I didn't but once. I advertised it twice. The first time all the parties agreed to postpone the sale.

X Q. 25. Then you advertised once and the parties that were asking a sale of it stopped the sale?

A. Well, I don't know. They wanted it stopped. Mr. Harper agreed that it should be stopped. All the parties interested that I could find here wanted it stopped, and the entry was made in court stopping it.

X Q. 26. What the entry in court says expresses the fact of the case as it really is?

A. Yes, sir. By consent of all parties the sale of the road is postponed.

X Q. 27. Then it was offered again and you advertised.

411–500 No bidders appeared except Mr. Riddle in behalf of the complainants or somebody else, and his was only a conditional bid.

A. Yes, sir.

X Q. 28. It has never been struck off to him?

A. No, sir.

X Q. 29. Have you reported the fact that you offered it for sale?

A. No, sir; not except verbally. I spoke to the judge about it and asked his advice.

X Q. 30. You have no written report to the court of the fact?

A. No, sir.

X Q. 31. Do you intend to?

A. I expect to; yes, sir.

X Q. 32. Or do you hold the subject now under consideration; that if Mr. Riddle desires to take the road you will allow him to do it?

A. No, sir; I don't think he could have done it if he wanted to; now or the last two or three months if he desired to. I believe he has said so, although not personally to me.

X Q. 33. Who has informed you that he does not propose to take it?

A. Mr. McHenry, I believe.

X Q. 34. What in substance are the terms of the present lease with Mr. Kirk?

A. I will have to get a copy of it before I can tell you.

X Q. 35. What is the substance?

501 A. The substance of the lease with Mr. Kirk is that he shall operate the road, pay all the expenses of operating the road, hold me harmless in every way, not make any contracts in my name, and that he shall give bond for the amount of a thousand dollars, with the condition that he shall keep this contract. The condition of the bond is to keep the agreement on both sides.

X Q. 36. He has not paid any money for the use of the road while running it?

A. No, sir.

By Mr. BOYD:

X Q. 37. And you reserve the right to terminate the contract?

A. It was reserved by both parties.

By Judge JORDAN:

X Q. 38. He furnishes the rolling stock?

A. He is using the rolling stock of the company.

X Q. 39. What company?

A. The Cincinnati, Columbus and Hocking Valley Railway Company.

X Q. 40. What cars is he using?

A. Mr. Harper and myself agreed that he should keep an account of the car mileage—that is, the use of the cars—that is, if the car-were found to be Mr. Harper's personally, he should arrange with Mr. Harper for them; if not, he should arrange with the company.

X Q. 41. Now, does he run a passenger car?

502 A. No, sir; simply what is called a combined baggage and mail car. He is not running cars at all or has not been that I know of during this last period, at least.

X Q. 42. He has some sort of accommodation for traveling, but imperfect?

A. Yes, sir; there are seats in the baggage car.

X Q. 43. Or caboose?

A. Yes; it is a little better than a caboose; it is a combined mail and baggage car.

X Q. 44. Does he run on the entire length of road?

A. At present he does; part of the time he didn't.

X Q. 45. Do you know how many trips he makes a day?

A. 2 or 3 a day; down in the morning and back in the afternoon; 1 trip each way a day.

It is agreed, pursuant to the agreement on page 325 of the record in this case by the counsel for the complainants and the counsel for the defendants, that the first-mortgage bonds of the Cincinnati, Columbus and Hocking Valley Railway Co. No. 197, and endorsed by the commissioner in this case with the title of the case which *he* may be offered under said agreement at the trial of this cause, is one of the series of the first-mortgage bonds that were issued in pursuance of the contract of October 12th, 1881, marked Exhibit —, and that all said bonds are alike except as to numbers and amounts.

503 WM. E. McHENRY recalled.

Examination by JOHN W. WARRINGTON, Esq.:

Q. 1. What is the paper that I now hand you?

A. That is the agreement of settlement of Preston and McHenry with their creditors.

Q. 2. Will you give it to the examiner for the purpose of having a copy made of it and attached to your deposition as an exhibit, marked Exhibit A, McHenry?

Counsel for the defendants objects to the introduction of this paper in evidence.

A. Yes, sir.

Q. 3. When were the bonds which were referred to in this exhibit marked Exhibit A, McHenry, delivered to the persons whose signatures appear upon said paper if the said bonds or any of them were in fact delivered to them?

A. They were tendered to these gentlemen whose names appear on the paper on the 12th of February, 1882, on either the 12th or 13th, if my memory serves me right. A meeting was held by these creditors, at which they elected three trustees to take charge of, for the creditors, these bonds, with authority to sell them at any time at seventy-five cents on the dollar. These 3 trustees so elected by
504 that meeting were Messrs. C. J. Gilbert, Murray Nelson, and Wm. T. Baker. In accordance with the resolution adopted at the meeting we, Preston and McHenry, did so deliver to the trustees elected at this meeting and appointed by the creditors the bonds called for in the settlement by the gentlemen whose names are signed to the agreement, and took a receipt from these trustees for the full amount of these bonds, I think, on March 13 or 21, 1882, which receipt I now tender in evidence.

Counsel for defendants — to all testimony relating to the settlement made by Preston and McHenry, and also to the introduction of the receipt mentioned in the last answer.

Receipt offered in evidence, marked Exhibit B, McHenry.

Q. 4. State whether or not these three trustees whose names you have mentioned received all of the bonds on behalf of your creditors.

A. They did not, sir. Some of the creditors preferred to take them individually and not put them into the hands of the trustees.

Q. 5. Who were the latter creditors?

A. As I remember them they were Poole, Kent and Co. and Wm. Young & Co.

Counsel for the defendants objects to the testimony; there is no question put; that is incompetent. It is the answer that is incompetent.

Q. 6. Who were the members of the firm of Poole, Kent & Co.?

505 Counsel for the defendants object to the question.

Q. 7. State, if you know, whether Selah Young was a member of Poole, Kent & Co.

A. My impression is that he was.

Q. 8. State whether or not James M. Sherman was also a member of that firm.

A. He was.

Q. 9. State whether or not Elmore A. Kent was a member of the firm of Poole, Kent and Co.

A. He was.

Counsel for the defendants object to all this line of testimony.

Q. 10. State whether or not Abram Poole was also a mem- of that firm.

A. He was.

Q. 11. What, if any, persons other than those whose names you have been just referring to withheld their bonds from the trustees before named or any of them?

A. There was quite a number both in the number of people and in amounts that did so. I cannot recollect them all now, but I know some of them.

Q. 12. Do you know how many bonds Poole, Kent and Co. received from you?

506 A. My recollection is about $5,700. I could not state positively, but that is my recollection.

Q. 13. Were there or not any bonds that you delivered to the creditors of Preston & McHenry other than those that were sued upon by Poole, Kent and Co. and the trustees before named, whose judgments are in evidence in this case?

A. There were other bonds aside from that.

Q. 14. Then those are bonds that are still outstanding and not sued upon?

A. Still outstanding and not sued upon; yes, sir.

Q. 15. Is the number of the bonds that were given to the three trustees, Gilbert, Nelson, and Baker, correctly stated in the receipt, Exhibit B, McHenry?

A. So far as I know, yes, sir.

Q. 16. Is the number of said bonds that were given to *the* Poole, Kent and Co. correctly stated in the suit which they brought in the United States court against this company, the Cincinnati, Columbus and Hocking Valley Railway Co.?

A. Of course that is impossible for me to state. Poole, Kent and Co. may have other bonds outside of any that they may have sued on.

Q. 17. State when, if at all, the persons whose names appear upon the agreement of settlement, Exhibit A, McHenry, received, either in persons or through the trustees, the bonds mentioned in

507 that exhibit, and what, if anything, was done — your creditors towards waiving the time for the delivery, as mentioned in that exhibit, namely, Feb. 12, 1882?

Counsel for the defendants objects to the question on the ground that it is incompetency.

A. We were ready to deliver the bonds on February 12, 1882. Some of our creditors of their own volition postponed the time for delivering them, so that the bonds were delivered, some on February 12 and the last on March 21, 1882, as shown in the receipt of the trustees, Exhibit B, McHenry, aforesaid.

Q. 18. State, if you know, whether the bonds that were so delivered and received, as you have stated in your last answer, are represented in the judgments that are in controversy in this action.

A. Yes, sir; a large portion of them. Those that were sued for by Charles J. Gilbert, Murray Nelson, and Wm. T. Baker in case # 3670 of this court, and also those sued for by Abram Poole, Elmore A. Kent, and James M. Sherman and Selah Young, partners as Poole, Kent and Co., in case 3671 of this court, are so represented.

Q. 19. What more, if anything, was done by you and Mr. Preston under your agreement of settlement before mentioned, Exhibit A, McHenry, in this case than the delivery of the bonds therein mentioned?

508 Counsel for the defendant- objects to the question as incompetent and irrelevant.

A. In addition to the bonds that we gave our creditors we gave them twenty-five cents on the dollar in cash, for which we hold their receipts.

Counsel for the defendants — to so much of the answer as has been given.

The WITNESS (continuing): That was also a part of the agreement of December 5, 1881, that we should do so. As a matter of fact, our entire settlement with our creditors was carried out in every way according to the terms of the agreement of December 5, 1881, both as to the delivery of the bonds and the payment of twenty-five cents on the dollar in cash, for which we hold the vouchers of all the parties.

Counsel for the defendants object to all the evidence touching the last two exhibits offered in evidence by the complainants and everything that was done under them.

509 Cross-examination by Judge JORDAN:

X Q. 20. Did you see a black book in the hands of Mr. Boyd, one of the counsel in this case?

A. Will you please specify when?

Q. 21. A moment ago.

—. ——.

Q. 22. What is that book?

A. I have not the slightest idea in the world.

X Q. 23. Now, do you know how much in amount of these bonds is involved in the suits that were brought for judgment in the United States court?

A. Principal and interest, about $256,000.

X Q. 24. Principal alone.

A. I think $214,000 or $234,000, and I am not certain which.

X Q. 25. Was suit brought and judgment obtained against the Cincinnati, Columbus and Hocking Valley Railway Co. in the U. S. court in Cincinnati on all the bonds that were delivered by Mr. Harper in pursuance of Exhibit A, the contract of October 12, 1881?

A. That I could not say.

X Q. 26. You don't know, then, whether any of these bonds are omitted from these suits and now remain outstanding without judgment?

A. I could not state positively.

X Q. 27. I observe in the contract of settlement that there are a great many persons who became entitled to these bonds. Do you know whether they have parted with their title to these bonds since they were transferred to them?

510 A. I do not, sir; I have never endeavored to trace the bonds at all.

X Q. 28. Is there any way that you tell the amount of the bonds transferred to each one of these creditors?

A. No, sir; I don't believe there is now.

X Q. 28½. Now, how does it come that the firm of Preston & McHenry brought suit?

A. Preston and McHenry have never brought suit against this road. I am referring now to the suits on which judgments were obtained in Cincinnati.

X Q. 29. So that the bonds that were transferred by Preston and McHenry by virtue of that contract passed into the hands of the creditors and have never returned?

A. Part of them did; part of them passed into the hands of creditors.

X Q. 30. About what proportion?

A. That I could not tell you; I have no means of knowing.

X Q. 31. Those that did pass into the hands of creditors remained there and never did come back to Preston and McHenry as a firm?

—. ——.

X Q. 32. Do you know that they passed into the hands of any of the complainants that brought actions against the company in Cincinnati?

511 A. C. J. Gilbert, Murray Nelson, and W. T. Baker and the members of the firm of Poole, Kent and Co. Those were all the ones who brought suit outside of ourselves.

X Q. 34. Then when Gilbert, Nelson, and Baker brought their action they were simply the holders as trustees for those creditors?

A. I know nothing at all what arrangement Gilbert, Nelson, and Baker made with the creditors as to the ownership of the bonds. They appeared in this case as the *bona fide* owners of the bonds, and, so far as I know, they are. I don't know of any arrangement whatever between them and the creditors.

X Q. 35. You don't know whether the trustees became owners of these bonds or whether they are suing simply as trustees?

A. I do not, sir.

X Q. 36. Do you know whether the firm of J. W. Preston parted

with their bonds, sold them, or disposed of them in any way before the bringing of that action?

A. I do not, sir.

X Q. 37. Did you — those that were transferred to you don't mean as collateral security?

A. No, sir.

X Q. 38. So that the plaintiffs in these actions were the owners of the bonds at the time they brought them?

A. So far as I know, yes, sir.

X Q. 39. Where are those bonds now?

512 A. I suppose they are in the hands of the court. I do not know the legal aspect of the case exactly, but I presume they would be from the knowledge I have.

X Q. 40. State whether the persons who brought the suits upon these bonds, so far as you know, were entitled to the possession of these bonds at the time of bringing the actions and the depositing of them with the clerk of court, if they have been so deposited?

A. So far as I know they were.

Testimony closed.

513 EXHIBIT A, PART 1.

This agreement, between E. L. Harper, of Cincinnati, of the first part; Howard Eckert & Co., of the same city; J. W. Preston & Company, W. E. McHenry, and Preston & McHenry, of Chicago, the other parties hereto, witnesseth:

Whereas the said Harper is the owner of a narrow-gauge railroad now known as the Columbus, Washington and Cincinnati railroad, together with all its privileges and appurtenances; and

Whereas the above-named parties respectively have claims against said Harper, which he is desirous of paying and liquidating in bonds to be secured by a mortgage lien upon said railroad and appurtenances, it is agreed between the said Harper and the other parties hereto respectively as follows:

First. That the said Harper shall cause the gauge of said road to be changed to the standard gauge and shall extend the same from its present terminus at Allentown, Ohio, on the Dayton and Southeastern railroad, to the town of Jeffersonville, on the Southern Ohio R. R., and make the connection with the last-named road; also shall extend it from its present western terminus at New Burlington to the present line of the Little Miami railroad, at or near the town of Corwin, and make connection therewith.

Second. And the said Harper agrees to make said change of gauge and said extensions and connections with said roads

514 within four months from the date of this contract.

Third. And the said Harper further agrees within the same period of four months to cause to be organized under the laws of Ohio a railway company, to be named the Cincinnati, Columbus and Hocking Valley Railway Company, and to convey or cause to be conveyed and transferred to said company said railroad and extensions and all the privileges, appurtenances, and plant thereunto

belonging to said company — an unincumbered title therefor, except the mortgage bonds herein provided for.

Fourth. And the said Harper further agrees to cause said company to issue its coupons bonds of one hundred, five hundred, and one thousand ($100, 500, & 1000) each, payable in forty (40) years, with interest at six per cent. per annum, payable semi-annually, which shall be secured by a first mortgage upon the said railroad and its extensions and the real and personal property and franchises of said company then owned or thereafter acquired by it, said first-mortgage bonds not to exceed in the aggregate an amount equal to the rate of twenty thousand dollars ($20,000) per mile of the length of said road and extensions, and said Harper likewise agrees to cause said company to issue income bonds of one hundred (100), five hundred (500), and one thousand (1,000) dollars each, payable in forty (40) years, properly secured, which shall not exceed in the aggregate twenty thousand (20,000) dollars per mile, interest and principal of said bonds to be made payable in New York city.

515 Fifth. And the said Harper further agrees to deliver to the said other parties hereto in payment of their respective claims said first-mortgage bonds at the par value thereof as follows:

To the said J. W. Preston & Co. seventy-five thousand five hundred and thirty-four and — dollars ($75,534.—).

To the said W. E. McHenry twelve hundred and fifty (1,250) dollars.

To the said Preston & McHenry one hundred and thirty-seven thousand and six hundred and twenty-two — dollars ($137,622.—).

To the said H. Eckert & Co., agents for W. E. McHenry and Preston and McHenry, five hundred dollars ($500), and likewise to deliver as a bonus at the par value thereof fifty per centum of the above amount respectively in said income bonds.

Said deliveries to be made within four months from the date hereof at the Third National Bank of Cincinnati.

And the said Howard Eckert & Co., J. W. Preston & Co., W. E. McHenry, and Preston and McHenry each for himself and themselves agree to accept said first-mortgage and income bonds in full payment of the indebtedness of said Harper to each of them respectively.

516 In witness whereof the said parties have hereunto set their hands this twelfth (12th) day of October, A. D. 1881, in triplicate.

E. L. HARPER. [SEAL.]
W. E. McHENRY. [SEAL.]
J. W. PRESTON. [SEAL.]
PRESTON & McHENRY. [SEAL.]
HOWARD ECKERT & CO.,
Agents for W. E. McHenry and Preston & McHenry. [SEAL.]

Signed, sealed, and delivered in the presence of—
ALBERT P. GAHR.
HENRY P. OWENS.

Copy.

517 EXHIBIT A, PART 2.

CINCINNATI, *Feb'y 11th*, 1882.

Received of E. L. Harper two hundred and fourteen thousand dollars first-mortgage and one hundred seven thousand and two hundred dollars of income bonds of the Cincinnati, Columbus and Hocking Valley R'y Co. in full demands on the within contract.

W. E. McHENRY.
J. W. PRESTON & CO.
PRESTON & McHENRY.
HOWARD ECKERT & CO.,
Agents for W. E. McHenry and Preston & McHenry.

Copy.

518 EXHIBIT B.

Know all men by these presents that John E. Gimperling, William Woods, Alexander Swift, Lewis Seasongood, B. S. Cunningham, and Edward L. Harper, all citizens of the State of Ohio, desiring to become incorporated under the laws of the State of Ohio for the purpose of constructing, maintaining, and operating a railroad commencing at or within the city of Cincinnati, in the county of Hamilton, and extending into the city of Columbus, in the county of Franklin, in the State of Ohio, do enter into the following articles of incorporation and certify as follows:

First. That the name of said corporation shall be the Cincinnati, Columbus and Hocking Valley Railway Company.

Second. That said corporation is formed for the purpose of constructing, maintaining, and operating a railroad.

Third. That a point within the city of Cincinnati, in the county of Hamilton and State of Ohio, shall be the southern terminus, and a point within the city of Columbus, in the county of Franklin, State of Ohio, shall be the northern terminus of said railroad, and the said railroad shall pass through the counties of Hamilton, Butler, Warren, Clinton, Greene, Fayette, Madison, Pickaway, and into the county of Franklin, to a point within the city of Columbus, and all in the State of Ohio.

519 Fourth. That the principal business office of said corporation shall be located in the city of Cincinnati, in the county of Hamilton, in the State of Ohio.

Fifth. That the amount of the capital stock of said corporation shall be two million five hundred thousand (2,500,000) dollars, divided into twenty-five thousand (25,000) shares of one hundred (100) dollars each.

In witness whereof the said John E. Gimperling, William Woods, Alexander Swift, Lewis Seasongood, B. S. Cunningham, and Edward L. Harper have hereunto subscribed their names this fourth day of November, A. D. 1881.

JOHN E. GIMPERLING.
WILLIAM WOODS.
ALEX. SWIFT.
LEWIS SEASONGOOD.
B. S. CUNNINGHAM.
E. L. HARPER.

STATE OF OHIO, } ss:
County of Hamilton, }

Be it remembered that on this 4th day of November, A. D. 1881, before me, the subscriber, a notary public in and for said State and county, personally came John E. Gimperling, William Woods, Alex. Swift, Lewis Seasongood, B. S. Cunningham, and E. L.
520 Harper, the signers of the foregoing certificate of incorporation, and acknowledged the signing thereof to be their voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and notarial seal on the day and year last aforesaid.

CHAS. M. POAGUE,
Notary Public, Hamilton County, O. [SEAL.]

STATE OF OHIO, } ss:
Hamilton County, }

I, Samuel W. Ramp, clerk of the court of common pleas within and for said county of Hamilton, do hereby certify that Chas. M. Poague, whose name is signed to the certificate hereto attached, was at the time of subscribing the same a legally acting notary public in and for said county of Hamilton, duly commissioned and qualified, and that I am well acquainted with his handwriting and believe his said signature to be genuine, and that he is authorized to take the depositions of witnesses, acknowledgments of deeds, etc.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 4th day of Nov., A. D. 1881.

SAM'L W. RAMP,
Clerk H. C. C. P. O., [SEAL.]
By EMIL HOFFMAN, *Deputy.*

521 UNITED STATES OF AMERICA, }
Ohio. }

OFFICE OF THE SECRETARY OF STATE.

I, Charles Townsand, secretary of state of the State of Ohio, do hereby certify that the foregoing is a true copy of the certificate of incorporation of the Cincinnati, Columbus and Hocking Valley Railway Company, filed in this office on the 7th day of November, A. D. 1881, and recorded in volume 23, pages 371, of the Records of Incorporations.

In testimony whereof I have hereunto subscribed my name and affixed my seal, at Columbus, the 7th day of Nov., A. D. 1881.

CHARLES TOWNSAND,
[SEAL.] *Secretary of State.*

Notice.

Books for subscription to the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Company, a corporation under the laws of the State of Ohio, will be opened on Saturday, the tenth

(10th) day of December, A. D. 1881, at 10 o'clock a. m., at the law office of Perry and Jenney, N.W. cor. 4th and Walnut Sts., in the city of Cincinnati, Ohio.

J. E. GIMPERLING,
WILLIAM WOODS,
B. S. CUNNINGHAM,
LEWIS SEASONGOOD,
E. L. HARPER,
ALEX. SWIFT,
Incorporators.

522

Cincinnati, O., Nov. 9, 1881.

CINCINNATI, *December* 10, 1881.

This book is opened for subscriptions to the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Company, a corporation under the laws of Ohio, in accordance with and at the time and place stated in the foregoing notice, which notice was duly published thirty days before this day in the Cincinnati Daily Commercial, a newspaper of general circulation in this county.

J. E. GIMPERLING.

523 Subscriptions to the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Company, a corporation under the laws of Ohio.

We, the undersigned, respectively subscribe for and agree to take and to pay for the number of shares of the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Company set opposite to our respective names:

Name.	Residence.	No. of shares.
E. L. Harper	Cincinnati	Two hundred and fifty (250).
E. L. Harper	"	Twenty-two hundred & fifty (2,250).
John L. Pfau	"	One.
E. Snowden	"	One.
J. H. Matthews	"	One.
W. H. Harper	"	One.
J. E. Gimperling	Dayton, O.	One.
Lewis Seasongood	Cincinnati.	
Geo. E. Clymer	Newport, Ky.	One.
D. P. Hyatt	Cincinnati	One.
Wm. C. Herron	Cincinnati	One.

524 EXHIBIT C.

Minutes of a meeting of the subscribers to the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Company, a corporation under the laws of Ohio, for the election of directors, etc.

The book for subscriptions to the capital stock of said company having been duly opened in accordance with the notice published

by the subscribers of the articles of incorporation, and more than ten per cent. (10 %) of the capital stock of said company having been subscribed for and a certificate of such subscription having been duly forwarded by mail to the secretary of the state of Ohio, all of the subscribers to said capital stock met, pursuant to notice from the subscribers of the articles of incorporation of said company, at the office of Perry & Jenney, in the Melodeon building, on the northwest cor. of 4th and Walnut Sts., in the city of Cincinnati, Ohio, this 13th day of December, A. D. 1881, at 2.30 o'clock p. m., and all in writing personally waived the notice referred to in sec. 3244, as amended, of the Revised Statutes of the State of Ohio, and consented and agreed that the meeting for the election of directors of said company should be then and there held.

Present:

Name:	No. of shares.		How represented.
E. L. Harper	Representing shares		In person.
Jno. E. Gimperling	"	"	"
John L. Pfau	"	"	"
525 Daniel P. Hyatt	"	"	"
E. Snowden	"	"	"
George E. Clymer	"	"	"
William H. Harper	"	"	"
James H. Matthews	"	"	"

Upon motion, Mr. Geo. E. Clymer was chosen chairman and Mr. James H. Matthews was chosen secretary of the meeting.

It was thereupon moved by Mr. Jno. L. Pfau that the number of directors of the company be seven (7); which motion, being duly seconded by Mr. E. Snowden, was put to vote and unanimously carried.

It was thereupon moved by Mr. Jno. L. Pfau that the meeting proceed to elect by ballot the directors of the company to serve until the next annual election and until their successors are chosen and qualified; which motion, being duly seconded by Mr. Daniel P. Hyatt, was put to vote and unanimously carried.

Thereupon the meeting proceeded to the election of seven (7) directors by ballot.

Messrs. E. L. Harper and Jno. E. Gimperling, of the subscribers to the articles of incorporation, were the inspectors of such election (they being the only ones of the subscribers of the articles of incorporation present) and certified in writing that John L.
526 Pfau, Dan'l P. Hyatt, John E. Gimperling, Eugene Snowden, James H. Matthews were elected directors of this company, and appointed the said office of Perry and Jenney as the place where and immediately as the time when said directors should hold their first meeting.

Thereupon the meeting adjourned.

J. H. MATTHEWS, *Secretary.*

GEO. E. CLYMER, *Chairman.*

527 Minutes of the first meet-ng of the board of directors of the Cincinnati, Columbus and Hocking Valley Railway Co., held at the office of Perry and Jenney, Melodeon building, northwest cor. 4th and Walnut Sts., Cincinnati, Ohio, this 13th day of December, A. D. 1881, at 3.30 o'clock p. m., being the time and place fixed by the inspectors of the election of said directors for the holding of thier first meeting.

Present: Jno. L. Pfau, Dan'l P. Hyatt, Jno. E. Gimperling, Eugene Snowden, Geo. E. Clymer, William H. Harper, and James H. Matthews.

Chas. M. Pogue, Esq., a notary public for Hamilton county, Ohio, was called into the meeting, and each of the directors took and subscribed before him an oath faithfully to discharge the duties of the same.

Upon motion, Mr. Geo. E. Clymer was called to the chair and J. H. Matthews was chosen secretary of the meeting.

It was thereupon moved by Mr. John L. Pfau that the meeting proceed by ballot to the election of a president a-d vice-president, and also a secretary and treasurer and auditor of the company, the office of secretary and treasurer to be held by the same person; which motion was seconded by Mr. William H. Harper, was put to vote, and unanimously carried.

Messrs. Snowden and Hyatt were, on motion, choses tellers of said election.

528 Thereupon the meeting proceeded to ballot for said officers, and the tellers announced to the meeting that the following were unanimously elected, viz:

Jno. E. Gimperling, president.
Geo. E. Clymer, vice-president.
J. H. Matthews, sec'y & treas.
C. A. Herbig, auditor.

Thereupon Mr. Gimperling took the chair.

Upon motion of Mr. Pfau, seconded by Mr. Clymer, the meeting proceeded to consider a code of by-laws for the government of the board and the company, and the following, after being considered section by section, were unanimously adopted, viz:

By-Laws.

1. The general offices of the company shall be kept at such place in the city of Cincinnati, Ohio, as the board of directors may from time to time determine.

2. At the annual meeting the president shall present, on behalf of the directors, a full report of the affairs of the company for the preceeding year, with such exhibits and details as may be necessary to explain the same, and for such purpose October 31st shall be fixed as the date of the close of the fiscal year of the company.

3. The board of directors shall consist of such number of
529 the stockholders as the stockholders may determine, and shall be elected by ballot at a meeting of the stockholders under the supervision of three judges of election, who shall be stockholders,

chosen by the stockholders at the meeting. The ownership of one share of stock shall be sufficient to qualify a director or other officer required by law to be a stockholder.

The polls shall be kept open two (2) hours after the adjournment of the meeting, and the votes shall be immediately counted and the result certified in writing, signed by the judges, to the secretary of the company, who shall enter the same, together with the proceedings of the meeting, in the minute book of the company.

Immediately on receiving such return of the judges the secretary shall give notice to each of the persons so elected of their election and of the time of the meeting at the office of the company for the organization of the board so elected.

In case of a tie vote the choice shall be determined by lot. If any director so elected and notified shall within thirty (30) days of such election fail to accept and file the required oath of office, his place shall thereby be vacated, and the directors shall proceed to elect a director to fill the vacancy.

4. The board of directors shall choose a president and vice-president, who shall be *numbers* of the board, and also appoint a
530 secretary, a treasurer, and an auditor, and also appoint such other officers as they from time to time think requisite for the company's interests, and they shall hold their office and receive such compensation as may be fixed from time to time by the board of directors.

The president shall also be general manager and the chief executive officer of the company, and, in addition to the duties generally devolving upon the president of a railway company, shall be supervisor of all the business and interests of the company under the direction of the board of directors.

In case of the absence or disability of the president the vice-president shall act in his place.

5. The appointments of all the officers shall be made with the express understanding that they are subject to the will and pleasure of the directors as to term of service and rate of compensation.

6. The regular meetings of the directors shall be held at the company's office at ten o'clock (10) a. m. on the second Tuesday in every month.

7. The election or appointment and the fixing or changing of the compensation or the removal of any officer or the amendment, suspension, or repeal of any by-law of the company shall require the affirmative vote of a majority of the whole board.

8. The president, and in his absence the vice-president, shall preside at the meetings of the board, and the secretary shall attend and keep full minutes of their proceedings; and special meetings
531 of the directors may be called at any time or place by the president, or in his absence the vice-president, or by any other member of the board.

9. The president, vice-president, and treasurer shall constitute the executive committee, who shall meet at the office of the company as often as the interests of the company shall require. It shall be their duty to investigate all disbursements and transact such other

business as the interests of the company may render necessary between the regular meetings of the board and submit minutes of their proceedings to the board for information and approval.

10. The secretary shall keep the office of the company open during business hours. He shall be the custodian of the seal of the company, and shall affix the same with his attestation thereon whenever the official business of the company may require. He shall attend all meetings of the stockholders, directors, and executive committee, unless excused, and keep a record and full and true minute of their proceedings.

He shall also attend the meetings of any committee appointed by the directors and stockholders, if requested, and keep a record of their proceedings.

He shall keep the books of the company and make transfers of stock upon the surrender and proper endorsement or cancellation of stock certificates which may be presented for transfer.

11. The board of directors may require the treasurer to
532 give bond, with two or more sureties satisfactory to them, in such amount as they may fix, conditioned that he will fully account for and pay over all moneys and assets of the company as prescribed by the directors and faithfully discharge the duties of his office. He shall collect all moneys and dues of the company and deposit the same as the directors may order. He shall pay all the indebtedness of the company upon vouchers properly certified and audited and systematically record the receipts and disbursements of the company and fill all vouchers therefor for ready reference. He shall certify to the auditor, at such periods of time as the board of directors may prescribe, a detailed statement of all moneys received and disbursed by him and for what purpose, and shall perform such other duties as the general manager, executive committee, or board of directors may prescribe.

12. The auditor shall be the general accountant of the company and as such shall be responsible for the correct showing, properly classified, of all receipts and disbursements of the company.

He shall see that all the claims against the company are fully verified and properly rendered, audited, and certified before they are paid and deliver to claimants their respective claims for collection. He shall furnish to the general manager or board of directors such reports as may from time to time be required.

13. When the subscriptions for the shares of stock shall have been fully paid certificates of stock shall be issued to each sub-
533 scriber for the number of shares which he may own under the corporate seal of the company and signed by the president and secretary.

14. Amendments or additions to these by-laws shall be submitted to the board of directors in writing, and action directly thereon shall be had except by the vote of a majority of the board.

Mr. Pfau moved that the seal of the company be a circle, with the name of the company around edge and the word "seal" in the middle, with the words "State of" above and "Ohio" below; which

motion was duly seconded, was put to vote, and unanimously carried.

Mr. E. L. Harper submitted to the board the following proposition in writing, viz:

To the board of directors of the Cincinnati, Columbus and Hocking Valley Railway Company.

GENTLEMEN: I hereby propose to broaden the gauge of the road now owned by me to a standard gauge and extend the same on the west to near Corwin, on the Little Miami road, and also to extend the east end to Jeffersonville, on the Springfield Southern road, say about thirty (30) miles of railroad, and hereby agree to sell the same to your company for eighteen hundred thousand (1,800,000) dollars of the par value of the securities of your company as follows, viz:

Six hundred thousand (600,000) of the 1st-mortgage, forty
534 (40) years, at six per cent. (6%), bonds, issued at rate of twenty thousand (20,000) per mile *mile* of constructed road and six hundred thousand (600,000) of the capital stock, including subscriptions already subscribed.

(Signed) E. L. HARPER.

Cincinnati, Ohio, December 13th, 1881.

This proposition is based on thirty (30) miles of road; if actual measurement is less than thirty (30) proportionate allowance will be made.

(Signed) E. L. HARPER.

Mr. Pfau moved that the proposition of Mr. E. L. Harper be accepted, subject to ratification by the stockholders of the company; which motion was seconded by Mr. Hyatt, was put to vote, and unanimously carried by the following vote:

Ayes—Mr. Pfau, Mr. W. H. Harper, Mr. Snowden, Mr. Clymer, Mr. Hyatt, Mr. Matthews.

Nays—None.

It was moved that the general office of the company be, for the present, at No. 30 West 3rd St., Cincinnati, Ohio.

On motion, adjourned.

J. H. MATTHEWS, *Sec'y.*

535 The subscribers to the capital stock of said The Cincinnati, Columbus and Hocking Valley Railway Co. on said Dec. 13, 1881, adopted in writing the following regulations for said company:

Regulations.

I. The meeting- of the stockholders of the company shall be held at the general office of the company in the city of Cincinnati, Ohio.

II. The annual meeting of the company, for the election of directors and for the transaction of such other business as may come before the meeting shall be held at the hour of 10 o'clock a. m. on the second Tuesday in December of each year, and notice of the holding of the same shall be given by a written or printed notice mailed to the address of each stockholder and by notice published

in a newspaper of general circulation in the city of Cincinnati, Ohio, at least ten (10) days before the time fixed for the holding of such meeting.

III. Special meetings of the stockholders shall be called by the board of directors, and the same notice thereof shall be given as is provided in article II for the annual meeting: Provided that in case all stockholders or subscribers for stock are present in person or by proxy such notice may be waived in writing, and the meeting may proceed to the transaction of business the same as if held at the time stated in such notice.

536 IV. The holders of a majority of the stock shall constitute a quorum at either the annual or special meetings of the stockholders of the company.

V. The meetings shall organize by the selection of a chairman and secretary, and the business of the meeting shall be conducted in the manner usual with companies of this character.

VI. The officers of the company shall consist of a president, vice-president, secretary, treasurer, and auditor, to be chosen by the board of directors, and the officers of secretary and treasurer may be filled by the same person.

The president and vice-president must be members of the board of directors. The duties and compensation and the tenure of office of these officers shall be such as the board of directors may fix from time to time.

We, the undersigned, subscribers of the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Co., a corporation under the laws of Ohio, hereby assent to the foregoing "regulations" and adopt the same as the regulations of said company.

(Signed)	E. L. HARPER.
"	GEO. E. CLYMER.
"	J. E. GIMPERLING.
"	JOHN L. PFAU.
"	DAN'L P. HYATT.
"	W. H. HARPER.
"	E. SNOWDEN.
"	J. H. MATTHEWS.

537 Minutes of a special meeting of the stockholders of the Cincinnati, Columbus and Hocking Valley Railway Co., held at the office of the company, No. 30 West 3rd street, Cincinnati, Ohio, this January 2nd, 1882, at 12.30 p. m.

Present:	John E. Gimperling,	in person,	representing one share.
	E. L. Harper,	"	" "
	W. H. Harper,	"	" "
	John L. Pfau,	"	" "
	D. P. Hyatt,	"	" "
	J. H. Matthews,	"	" "
	Geo. E. Clymer,	proxy to E. L. Harper,	"
	E. Snowden,	" "	" "
Absent:	None.		

28—59

All of the stockholders were present, either in person or by proxy, and in writing waived notice of the calling of the meeting and consented to the holding of the meeting.

Upon motion, Mr. John L. Pfau was called to the chair and J. H. Matthews was chosen secretary of the meeting.

The secretary read to the meeting a proposition made to the board of directors by E. L. Harper in regard to the transfer by him to this company of the Columbus, Washington and Cincinnati railroad, now owned by him, and the action of the board of directors
538 accepting such proposition, and the action of the board of directors thereon is at length set forth on pages 10 and 11 of the minutes of this book and is hereby referred to.

It was thereupon moved by Mr. Gimperling that the said proposition be accepted, and that the board of directors be authorized to carry out and comply with said proposition of the part of the company and to accept from said E. L. Harper such deed or conveyance of the said railroad and its property as to the board of directors may seem proper; which motion was seconded by Mr. Hyatt, was put to vote, and carried by the following vote:

Yea—W. H. Harper, Jno. L. Pfau, D. P. Hyatt, J. E. Gimperling, J. H. Matthews; Geo. E. Clymer, by E. L. Harper, att'y; E. Snowden, by E. L. Harper, att'y.

Nay—None.

539 A called meeting of the board of directors of the Cincinnati, Columbus and Hocking Valley Railway Co. was held at the office of the company, No. 30 West 3rd St., Cincinnati, Ohio, this 30th day of June, 1882, p. m., with the following members present:

J. E. Gimperling, Geo. E. Clymer, D. P. Hyatt, J. L. Pfau, E. Snowden, J. H. Matthews.

Absent: W. H. Harper.

Mr. Gimperling then took the chair.

It was then moved by Mr. Pfau, and seconded by Mr. Snowden, that the reading of the minutes of previous meeting be dispensed with; was put to vote and carried.

Whereupon Mr. Pfau then made the following motion:

Whereas the president, Mr. Gimperling, reports that E. L. Harper has complied with his contract made with the company for the construction of twenty-eight (28) miles of railroad from Claysville Junction to Jeffersonville, Ohio, and that the chief engineer, H. Phillips, has certified to the Union Trust Co. of New York that the twenty-eight (28) miles have been constructed in accordance with the terms of the contract: Therefore

Resolved, That the road be accepted from said E. L. Harper, and he be paid any balance in bonds, stock, or money which may be due him on said contract, taking his receipt *receipt* for same.

Which motion was seconded by Mr. Clymer and carried unanimously.

540 There being no further business before the board, Mr. Pfau

moved to adjourn, which was seconded by Mr. Hyatt and carried.

J. H. MATTHEWS, *Secretary.*

GIMPERLING, *Chairman.*

A special meeting of the board of directors of the Cincinnati, Columbus and Hocking Valley Railway Co. was held at the office of the company, No. 30 West 3rd street, Cincinnati, this 20th day of February, 1883, at 2.30 p. m., with the following members present:

Geo. E. Clymer, D. P. Hyatt, J. L. Pfau, E. Snowden, W. H. Harper, and J. H. Matthews.

Absent: J. E. Gimperling.

Mr. Clymer took the chair.

It was thereupon moved and seconded that the reading of the minutes of the previous meeting be dispensed with. Carried. Mr. Clymer then read the resignation of Mr. J. E. Gimperling, pres. & gen. manager.

Mr. Clymer then read the resignation of Mr. C. A. Herbig, auditor and general freight agent. Moved by Mr. Pfau, and seconded by Mr. W. H. Harper, that his resignation be accepted, to take effect at once, and that his accounts be turned over to his successor.

The board next proceeded to fill the vacancies caused by the resignation of Mr. Gimperling and Mr. Herbig.

Mr. Pfau moved that Mr. W. C. Herron be elected a director of the Cincinnati, Columbus and Hocking Valley Rail. Co. to take the place of Mr. Gimperling, resigned.

541 Mr. Herron accepting, was seconded by Mr. W. H. Harper and unanimously carried.

Mr. W. H. Harper thereupon moved that Mr. D. P. Hyatt be elected president and general manager to fill vacancy caused by resignation of Mr. Gimperling and Herbig; was seconded by Mr. Snowden, was put to vote, and carried by the following vote:

Ayes—J. L. Pfau, Geo. E. Clymer, W. H. Harper, E. Snowden, W. C. Herror, J. H. Matthews.

Nays—none.

Mr. Hyatt, accepting the office, was declared elected.

Thereupon it was moved by Mr. Pfau, and seconded by Mr. W. H. Harper, that the secretary notify Mr. Gimperling and Mr. Herbig of the action of the meeting accepting their resignations, to take effect at once upon the accounts being turned over to their successor.

There being no further business before the meeting, Mr. Snowden moved to adjourn, which, being seconded by Mr. W. H. Harper, was carried.

J. H. MATTHEWS, *Secretary.*

G. E. C——, *Chairman.*

542 EXHIBIT A, GAHR.

Copy.

E. L. Harper, pres't; Geo. E. Clymer, V.-pres't; J. B. Matthews, treas.; J. L. Pfau, sec'y.

Office of Swift's iron & steel works. Incorporated 1866. # 26 West 3rd St.

"Swift's" rolling mills, bloomery, rail mill & blast furnace, Newport, Ky. Riverside rolling mill, Cincinnati, Ohio.

In reply to yours of the—

CINCINNATI, *Feb. 9th*, 1882.

Received of E. L. Harper five hundred dollars, par value first-mortgage, and three hundred dollars, par value income bonds of the Cincinnati, Columbus and Hocking Valley R'y. Co., Nos. 201 and 248, '49, & 50, in full, of all demands on contract of Oct. 12th, 1881.

(Signed) HOWARD ECKERT & CO.

Page 37. A. P. G.

543 EXHIBIT "A," HARPER.

Page 396.

No. —. Nov. 2, '81.
Baldwin.
$48,995.00.

* * * * * * *

No. —. —— —, 188–.
$6,000.00.
6,000
6,000
7,000
7,000
6
——— Making 32,000.00.
J. E. Gimberling.

* * * * * * *

No. —. —— —, 188–.
Hunter's dr'fts, 1,616.55, paid.
Deposited of E. L. Huffmyer.
Watson.
300
619.10
Studdebaker.

* * * * * * *

No. —. JAN. 28, 1882.

$5,000.

J. E. Gimperling, to Winters' Nat'l bank, Dayton, to credit J. E. G., making 37,000.00 to act., & 3,000 to Bank N. Co., making 40.

* * * * * * *

No. —. FEB. 11TH, 1882.

$5,000.00.

J. E. Gimperling, to date	42,000
Bank Note Co.	3,000
Making	45,000 to date

* * * * * * *

No. —. M'CH 3RD, 1882.

$5,000.00.

J. E. Gimperling.

Making	47,000.00	$47,000
	3	3,000
Bank Note Co.,	50,000.00	50,000

205	41
239	9
1845	
615	
410	
48,995	

A. S. L.
C.

$23,933.25.
25,089.91. Feb.

544 $6,000. DAYTON, OHIO, *Nov.* 29, 1881.

Pay to the order of V. Winters & Son six thousand dollars, value received, and charge the same to account of—

J. E. GIMPERLING.

To E. L. Harper, Esq., Cincinnati, Ohio.
No. —.

(Endorsed:) Pay Geo. H. Bohrer Co. or order, for collection account of V. Winters & Son, Dayton, O.
(In pencil:) Paid Gimperling 1,000 in cash.
" B," Harper.

545 No. —. CINCINNATI, *Dec.* 10*th*, 1881.

Third National bank pay to order of J. E. Gimperling, Esq., six thousand dollars.

$6,000.00. E. L. HARPER.

(In pencil:) Ex. B, Harper.

(Endorsed:) Jno. Gimperling. Pay Citizens' National bank, Cincinnati, Ohio, or order, for collection for account of V. Winters & Son. Dayton, O. Citizens' National bank, Dec. 13, 1881. 29.

B, Harper.

546 No. —. CINCINNATI, *Dec.* 13, 1881.

Third National bank pay to the order of J. E. Gimperling, Esq., seven thousand dollars.

$7,000.00. E. L. HARPER.

(Endorsed:) J. E. Gimperling. Pay John R. DeCamp, cas., or order, for collection account of V. Winters & Son. Dayton, Ohio. Received payment. 17. Metropolitan Nat'l bank.

C, Harper.

547 No. —. CINCINNATI, *Dec.* 29, 1881.

Third National bank pay to the order of J. E. Gimperling, Esq., seven thousand dollars.

$7,000.00. E. L. HARPER.

(Endorsed:) J. E. Gimperling. Pay Metropolitan National bank, Cincinnati, O., or order, for collection for account of the Winters Nat'l bank, Dayton, O. J. C. Deberm, cashier. Receiver payment. 17. Metropolitan Nat'l bank.

D, Harper.

548 No. —. CINCINNATI, *Jan.* 12, 1882.

Third National bank pay to the order of J. E. Gimperling, Esq., six thousand dollars.

$6,000.00. E. L. HARPER.

(Endorsed:) J. E. Gimperling. Pay Citizens' National bank, Cincinnati, Ohio, or order, cor collection for account of the Winters National bank, Dayton, O. J. C. Reber, cashier. Citizens' National bank, Jan. 16, 1882. 29.

Ex. E, Harper.

549 No. —. CINCINNATI, *Jan.* 20, 1882.

Third National bank pay to the order of Winters' Nat'l bank, J. E. Gimperling, five thousand dollars.

$5,000.00. E. L. HARPER.

(Endorsed:) Pay Citizens' National bank, Cincinnati, O., or order, for collection for account of the Winters National bank, Dayton, O. J. C. Reber, cashier. Citizens' National bank, Jan. 31, 1882. 29.

Exhibit F, Harper.

550 No. —. CINCINNATI, *Feb.* 11*th*, 1882.

Third National bank pay to the order of J. E. Gimperling, Esq., five thousand dollars.

$5,000.00. E. L. HARPER.

(Endorsed:) J. E. Gimperling. Pay Citizens' National bank, Cincinnati, Ohio, or order, for collection for account of the Winters National bank, Dayton, Ohio. J. C. Reber, cashier.

Exhibit G, Harper.

551 No. —. CINCINNATI, *M'ch* 3*rd*, 1882.

Third National bank pay to the order of J. E. Gimperling, Esq., five thousand dollars.

$5,000.00. E. L. HARPER.

(Endorsed:) J. E. Gimperling. Pay Citizens' National bank, Cincinnati, Ohio, or order, for collection for account of the Winters National bank, Dayton, O. J. C. Reber, cashier. Citizens' National bank, M'ch 6, 1882. 29.

Exhibit H, Harper.

552 $1,500. DAYTON, O., *M'ch* 14, 1882.

At sight pay to the order of J. C. Reber, cashier, fifteen hundred dollars, with current rate of exchange, value received, and charge the same to account of—

J. E. GIMPERLING.

To E. L. Harper, Cincinnati, O.
No. —.

(Endorsed:) Pay Geo. W. Forbes, cas., or order, for collection account of the Winters National bank, Dayton, O. J. C. Reber, cashier. Citizens' National bank. Paid March 15, 1882. Cincinnati, Ohio.

Exhibit I, Harper.

553 No. —. CINCINNATI, *April* 7, 1882.

Third National bank pay to order of J. E. Gimperling, Esq., five thousand three hundred sixteen $\frac{97}{100}$ dollars.

$5,316.97. E. L. HARPER.

[Endorsed:] J. E. Gimperling pay Citizens' National bank, Cincinnati, Ohio, or order, for collection for account of the Winters National bank, Dayton, O. J. C. Reber, cashier. Citizens' National bank. Apr. 10, 1882.

Exhibit J, Harper.

554 No. —. CINCINNATI, *May* 6, 1882.

Third National bank pay to the order of J. E. Gimperling, Esq., two thousand dollars.

$2,000.00. E. L. HARPER.

[Endorsed:] J. E. Gimperling pay Metropolitan National bank, Cincinnati, O., or order, for collection for account of the Winters National bank, Dayton, O. J. C. Reber, cashier. Received payment. 17. Metropolitan Nat'l bank.

Exhibit K, Harper.

555 $2,475.89. DAYTON, O., *June* 17, 1882.

At sight pay to the order of J. C. Reber, cas., twenty-four hundred seventy-five and $\frac{89}{100}$ dollars, value received, and charge the same to account of—

J. E. GIMPERLING.

To E. L. Harper, Cincinnati, O.

[Endorsed:] Pay Citizens' National bank, Cincinnati, O., or order, for collection for account of the Winters Nat'l bank, Dayton, O. J. C. Reber, cashier. Citizens' National bank. Paid June 19, 1882. Cincinnati, O.

Exhibit L, Harper.

556 No. —. CINCINNATI, *M'ch* 23, 1882.

Third National bank pay to the order of Franklin bank forty-five hundred dollars.

$4,500.00. E. L. HARPER.

[Endorsed:] Franklin Bank of Cincinnati. 9.

Exhibit M, Harper.

557 $4,500.00. CHAMBERSBURGH, PA., *March* 21, 1882.

At sight pay to the order of J. S. McIlvaine, cashier, forty-five hundred dollars, value received, and charge toe same to account of—

S. F. BOYD,
Sup't Cin'ti Valley R. R.

To E. L. Harper, Cincinnati, Ohio.

[Endorsed:] Paid by check on 3rd National bank, M'ch 23, '82, for collection and credit of National Bank of Chambersburgh, Pa. J. S. McIlvaine, cashier; B. F. Brannon, pres't. Or order for collection for the Exchange National Bank of Pittsburgh, Pa. A. Long, cash. Franklin Bank of Cincinnati. 9.

Exhibit M, Harper.

558 No. —. CINCINNATI, *Jan.* 28, 1882.

Third National bank pay to order of 3rd Nat'l bank three thousand dollars.

$3,000.00. E. L. HARPER.

Exhibit N, Harper.

[Endorsed:] N. Y. Ex. to Am. B'k Note Co. 3rd Cin. draft No. 64640 in Met. Nat. Bank, N. Y. N.

559 EXHIBIT "O," HARPER.

J. E. Gimperling in account with the C., C. & H. V. R'y Co.

E. L. Harper.

1881.		No. vou.	DR.	CR.
June 30.	By cash			200
Oct. 28.	To "		104 11	
Nov. 5.	" "		300	
		Oct.		
5.	By Sept. pay-rolls, Nos. 1 to 3, inc.	7, 8, 9		547 25
5.	" Forsyth, E. N.	10		354 86
7.	Oct. pay-roll, Nos. 1 to 4, inc.	12 to 15, inc.		727 97
		Nov.		
14.	Forsyth, E. V.	1		741 27
21.	Rogers, Geo. C.	2		594 26
23.	Forsyth, E. N.	4		699 88
25.	Forsyth, E. N.	5		517 08
27.	Gimperling, J. E.	6		153
30.	To Harper, E. L.		x 6,000	
Dec. 9.	By Forsyth, E. N.	14		965 43
12.	Nov. pay-rolls, Nos. 1 to 17, inc.	23 to 33, inc.		2,285 31
12.	Phillips, H.	22		87 10
14.	sundry persons	35 to 41, inc.		956 50
17.	Allen, E., & wife	45		804
11.	To Harper, E. L.		x 6,000	
13.	Harper, E. L.		x 7,000	
26.	By Morrison, A. H. & C. C.	4		543 69
		Dec.		
5.	Sanderson, S. N.	1		50
5.	Sanderson, C. N.	2		23
13.	Forsyth, E. N.	3		590 05
21.	Forsyth, E. N.	4		1,455 69
27.	sundry persons { 44.10 34 / 165.60 2.65 }	5 to 8, inc.		246 35
27.	Innes, Thos. B., engine	9		4,500
28.	E. N. Forsyth	10		964 49
31.	To Harper, E. L.		x 7,000	
1882.				
Jan. 4.	By Barnes, H. B., fr't	13		935
7.	McCreery, F., ties	14		65
13.	P. C. & St. L. R'y, fr't.	29		121 87
14.	Hooker & Counti, ties	30		2,910
14.	Cheesman, Wm., pay-roll	32		240 47
14.	Cheesman, Wm., "	33		28 60
16.	Dec. pay-rolls, Nos. 1 to 9, inc.	35 to 43, inc.		2,957 48
16.	Dec. pay-rolls, Nos. 10 to 21, inc.	44 to 45, inc.		2,404 67
20.	Lomas, K. & B., w'ks, iron supplies	57		709 34
20.	Post & Co., track supplies	58		55 14
21.	Stan, C. A. & Co., track supplies	60		24 75

Exhibit "O"—Continued.

1882.		No. vou.	Dr.	Cr.
Jan. 21.	Pickering, T. & A., track supplies	61		5 30
21.	Forsythe, E. N., bridges	63		531 90
	Amount forward		26,404 11	28,196 70
560	Amounts bro't forward		26,404 11	28,196 70
Jan. 16.	By sundry persons, ties (82.80, 120, 110, 30)	1 to 4, inc.		342 80
16.	Forsyth, E. N., bridge lumber	5		
16.	sundry persons, pay-roll. (77.83, 149.72, 58.48)	6, 7, 8		286 03
14.	To Harper, E. L.		6,000	
21.	By sundry persons, mort. record. (14.90, 13, 13.20, 13.30)	9, 10, 11, 12		54 40
21.	By Barnes, H. B., fr't	19		423 25
24.	Palmer, C. A., legal exp.	20		200
24.	Nebecore, J. M., ties	21		130
30.	Forsyth, E. N., "	22		641 38
30.	Armstrong, T. J., "	23		120
30.	Nebecore, J. M., "	24		245
30.	Leland, T. F., ag't, ties	25		415 37
30.	P. C. & St. R'y, fr't	26		58 42
30.	McCurry, F., tie exp.	27		30
Feb'y 2.	Forsyth, E. N., ties	29		1,020 18
3.	sundry persons, fr't (335.57, 440.22)	32, 33		775 79
3.	Sellers & Lackey, bridge timber	36		195 47
4.	Phillip, Aug., R. of W.	37		325
4.	sundry persons, ties (120, 120)	39, 40		240
9.	Forsyth, E. N., ties	46		388 78
9.	Travell, F. R., fr't engine	47		127
14.	Jan'y pay-roll, Nos. 1 to 11, inc.	48 to 58, inc.		3,012 37
14.	Hazen, J. T., & Co., iron supplies	59		825 78
"	Post & Co., iron supplies	60		35 29
"	Gebhart & Co., bridge timber	61		91 77
"	sundry persons, bridge material. (80 4.45, 37.50 2.50, 42.20)	62 to 66, inc.		168 65
17.	Nebucore, J. M., ties	72		240
"	Trasee, W. R., ag't, ties	73		5
"	Miller, Pickham & C., mort. exp.	74		25
"	Gimperling, J. E., mort. exp.	75		191 81
"	C., I. & C. R. R., R. of W.	76		2,000
"	Leland, B. F., ag't, fr't	78		80 74
"	Rowell, Mrs., R. of W.	79		75
"	Compton, Mana, R. of W.	80		500
18.	Forsyth, E. N., ties	81		2,418 06
"	Brown & Smith M'f'g Co., 5 cars	82		2,565
13.	To Harper, E. L.		x 5,000	
17.	" cash	77	195 89	
	" Harper, E. L.		x 5,000 4,752 24	
	Balance		**47,352 24**	**47,352 24**

561 EXHIBIT "P," HARPER.

J. E. Gimperling in account with C., C. & H. V. R'y Co.

E. L. Harper.

1882.		Voucher No.	Dr.	Cr.
Feb'y 19.	By balance as per statement this date			4,753 24
	January vouchers:			
May 13.	By Am. B'k Note Co., printing	85		55
4.	Morrison, A. H. & C. C., bridge material	86		839 55
	February vouchers:			
4.	By Feb. pay-roll, discharged men	1		87 74
	Barnes, H. B., ag't, fr't	5		327 75
	Union Trust Co.	6		770
	Leland, B. F., ag't, fr't	7		61 91
7.	Feb'y pay-rolls	8 to 17, inc.		2,990 09
	sundry persons, supplies. 3.05 1.30 / 2.75 7 / 2.50 2.50 / 21.75 12.00	18 to 25, inc.		52 85
9.	sundry persons, supplies. 37.85 2.46 2.85 / 16.95 18.67 19.95 / 5.60 3.50 9	26 to 34, inc.		116 83
	Hosier, J. R., lumber	37		46 66
	P., C. & St. L. R'y, fr't			5 67
13.	Rogers, Engle & Co., bridge supplies, 16.60, 12.78	39, 40		29 28
	Crady, Jno. M., recording	41		2 89
	Kelley, E. S., coal	42		21 70
	Armstrong, T. J., ties	43		200
	Hosier, J. R., lumber	44		516 64
	Barney & Smith M'f'g Co., hand-cars	45		255
	March vouchers:			
7.	By March pay-roll, discharged men	1		82 77
14.	Barney — Smith, labor in cars	2		9 50
15.	Rand, McNally & Co., printing	3		14 80
22.	Barnes, H. B., ag't, fr't	5		63 72
	Leland, B. F., "	6		21
2	P., C. & St. L. R'y Co., crossing Claysville	7		285 96
31.	Oglesbee, A. L., ties	8		90
Apr. 4.	Pruden, A., rent	9		16 67
	Gimperling, J. E., sundries	10		7 59
	P., C. & St. L. R'y Co., fr't	11		93 16
M'ch 4.	To Harper, E. L., d'ft		x 5,000	
14.	" do. "		x 1,500	
	Balance, paid Ap'l 7, '82, 3rd Nat'l		x 5,316 97	
			11,816 97	11,816 97

562 EXHIBIT "Q," HARPER.

Unpaid Vouchers and Pay-Rolls.

March pay-rolls	1,891 19
Smith & Huffman	13 85
Wise, G. C	14 50
Rohe, Geo. F	12 50
Hoxwoth, Geo	1

Huffman, Jas		75
Augustus, W	12	81
Whitmore, W. M	21	
Post & Co	40	
Union Trust Co	400	
Kammon, A. W	100	
Allen, E., Jr., & wife, R. of W	125	
Sparks, S., ties	654	75
Wilson, Sylvester, "	48	37
Gray, J. J., "	126	45
Lambert, Adam, "	21	37
Early, A., fencing	19	70
Oglesbee, A. L., ties	112	50
Noan, Jos., "	45	
Oglesbee, Jno., "	135	
Kellers & Lackey, "	238	28
Hosier, J. R., "	28	40
Kammon, A. W., *et al.*, discharged men	121	47
Total	4,183	89
Hayes, Morgan, R. of W.	250	
	4,433	89
May 6, '82, paid by check on 3rd Nat'l, Cin'ti	2,000	
June 17, d'ft	2,475	89

563 EXHIBIT "R," HARPER.

Construction Account.

To April 1st, 1882.

Engineering	1,200	95	
Grading & masonry	5,883	97	
Bridges, trestles, culverts	14,601	77	
Right of way	3,902		
Legal and R. of W. expenses	200		
Iron rails & material	25,989	25	
Ties, No. 24,396	13,754	51	
Fencing	872	97	
Track-laying	1,882	71	
Change of guage	2,408	38	
Contingent	2,474	17	
			73,170 68
Equipment engine # 1	4,500		
5 flats, No. 1, 2, 3, 4, 5	2,500		
			7,000
			80,170 68

564 EXHIBIT "S," HARPER.

Construction account		80,178 68
Outside expenditures as follows:		
Check, Apr. 7, 1882	2,316 97	
May 6, "	2,000	
Draft, June 17, "	2,475 89	
" M'ch 26, "	4,500	
For passenger cars, about	5,500	
To J. E. Gimperling, about	5,000	
" Am. Bank Note Co. N. Y., about	5,000	
Value of 20 miles narrow-gauge road, as shown by contract of sale for same to Alfred Sulley, N. Y., before any improvements whatsoever has been made thereon	75,000 00	
		$184,971 54

565 EXHIBIT A, HANNA.

CINCINNATI, *June 9th*, 1885.

To Thomas Hanna, Esq., receiver of the Cincinnati, Columbus and Hocking Valley railway.

DEAR SIR: I hereby propose to take charge and control of said railway and agree to operate it to the best advantage practicable in my own name and without any expense whatever to you, moving the freight, carrying passengers, and giving the people along the line of railway a daily mail so as to connect with the trains on the Pan Handle road on every day excepting Sunday. I further agree to keep the road in as good repair and condition as it now is, and will hold you harmless against any loss or damage whatever, and I will not make any contract in your name or involve you in any liability.

I will keep a strict account of the earnings and expenditures in the operation of the road and render you a monthly statement of the financial condition of said road, the resources and indebtedness, and you shall at all times have free access to the books of account.

W. F. McKay, Alfred McKay, and Is-iah Kirk will go my security, signing a bond of even date herewith for one thousand
566 ($1,000.00) dollars for the faithful performance of all the conditions of this agreement on our part to be performed.

I further agree that all improvements or betterments in the way of fixing track, putting in cross-ties, fixing the bridges, turnouts, or trussels, any improvements or work that I may do on the rolling stock, shall remain and be done at my own expense. I will not require or ask for any renumeration for the above except in respect to locomotive which I am now repairing, which you agree, should

said rolling stock be found by the court to be the property of said Cincinnati, Columbus and Hocking Valley railway, I should be paid a sum less one hundred — a month during the time I should use said locomotive should the court allow the cost of said work or improvement on said locomotive.

And it is further agreed, should this proposition be accepted and become a contract, that it may be terminated by either party giving to the other notice not less than ten days before his desire and intention to terminate the same.

JESSE H. KIRK.
THOMAS HANNA.

Signed in presence of—

—— ——.

—— ——.

567 EXHIBIT B 1, HANNA.

Know all men by these presents that we, Jesse H. Kirk and Alfred McKay, as principals, and W. T. McKay and Isaiah Kirk, sureties, are held and firmly bound unto Thos. Hanna, receiver of the Cincinnati, Columbus and Hocking Valley railway, in the sum of one thousand ($1,000.00) dollars, to be paid to the said Thomas Hanna, receiver, his successors, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the — day of June, one thousand eight hundred and eighty-four.

The condition of the above obligation is such that whereas said Jesse H. Kirk and Alfred McKay have entered into a contract dated June —, 1884, with Thomas Hanna, receiver of the Cincinnati, Columbus and Hocking Valley railway, whereby the said J. H. Kirk and the said Alfred McKey are to take possession and operate the said Cincinnati, Columbus and Hocking Valley railway according to the terms and conditions in said contract expressed: Now, therefore, should the said J. H. Kirk and the said Alfred McKey comply with and perform all the terms and conditions of said contract and save the said Thomas Hanna, receiver, harmless from any loss or damage resulting from the running and operating of said railroad during the continuous of said contract, then the above obligation to be void; otherwise to remain in full force and virtue.

568

JESSE H. KIRK.
ALFRED McKAY.
W. F. McKAY.
ISAIAH KIRK.

Signed, sealed, and acknowledged in the presence of us—

C. A. HAUGHEY.
E. T. BALES.
W. T. ROSENBARGER.

569 EXHIBIT B 2, HANNA.

Know all men by these presents that I, Jesse H. Kirk, as principal, and W. F. McKay, Alfred McKay, and Isaiah Kirk, as sureties, are held and firmly bound unto Thomas Hanna, receiver of the Cincinnati, Columbus and Hocking Valley railway, in the sum of one thousand dollars, to be paid to the said Thomas Hanna, his successors or assigns; for which payment, well and truly to be made, we bind ourselves, heirs, executors, and administrators, firmly by these presents.

Sealed woth out seals. Dated the — day of May, one thousand eight hundred and eighty-five.

The condition of the above obligation is such that whereas the said Jesse H. Kirk has entered into a contract dated May —, A. D. 1885, with Thomas Hanna, receiver of the Cincinnati, Columbus and Hocking Valley railway, whereby the said Jesse H. Kirk is to take possession and operate the said Cincinnati, Columbus and Hocking Valley railway, *whereby the said Jesse H. Kirk is to take possession and operate the said Cincinnati, Columbus and Hocking Valley railway* according to the terms and conditions in said contract expresses: Now, therefore, should the said Jesse H.
570 Kirk comply with and perform all the conditions in said contract and save the said Thomas Hanna, receiver, harmless from any loss or damage resulting from the running and operating of said railway during the continuance of said contract, then the above obligation to be void; otherwise to remain in full force and virtue.

JESSE H. KIRK. [SEAL.]
ALFRED McKAY. [SEAL.]
W. F. McKAY. [SEAL.]
ISAIAH KIRK. [SEAL.]

Signed, sealed, and acknowledged in presence of us—
EDMOND HENDERSHOTT.
LEWIS A. HAMMOND.

571 EXHIBIT A, MCHENRY.

Whereas it was agreed at a meeting of the creditors of the firm of Preston and McHenry, composed of Josiah W. Preston and William E. McHenry, held in the city of Chicago Dec. 5, 1881, on the part of each of us, the undersigned, *on the part of each of us, the undersigned*, creditors of said firm, — the sum of twenty-five cents in cash for every dollar owing by the said Preston & McHenry to us, their creditors aforesaid, together with an amount of the first-mortgage bonds of the Cincinnati, Columbus and Hocking Valley railway of Ohio equal to the full sum of each of our respective claims, debts, and demands against said firm, the said bonds to be estimated at their par value, the same to be delivered on or before February 12th, 1882:

Now, therefore, this agreement witnesseth that we, the said creditors of the said Preston & McHenry, do, for ourselves, severally and respectively, and for our executors, administrators, and assigns, promise and agree to and with the said Preston & McHenry by these presents that we, the said several creditors, shall and will accept, receive, and take of and from said Preston & McHenry in full discharge, payment, and release of our several debts and de-
572 mands against said firm the sum of twenty-five cents in cash for every dollar owing by the said Preston and McHenry to us, together with an amount of the first-mortgage bonds of the Cincinnati, Columbus and Hocking Valley railway of Ohio equal to the full sum of each of our respective claims, debts, and demands against said firm, the said bonds to be estimated at their par value and to be delivered on or before February 12, 1882: Provided always that in case said bonds are not delivered to said creditors within the time herein limited the agreement to be void and of no effect.

Edw. A. Driver & Co.,
Dwight Gillette,
James H. Milne & Co.,
C. F. Donghel,
C. A. Rogers,
McCormick & Beebe,
Hamill & Congdon,
J. B. Peabody & Co.,
Irwin, Orr & Co.,
Sibley, French & Co.,
A. Eichhold,
Geo. A. Wheeler,
C. H. Taylor & Co.,
J. H. Hobbs & Co.,
W. Northkop & Co.,
J. B. Reeme & Co.,
William Dickenson,
Bensley & Wagner,
573 Chas. Ray & Co.,
Poole, Kent & Co.,
Kreigh & Davies,
McDaniel, Reiss & Co.,
S. H. McCrea & Co.,
Porter, Holden & Co.,
L. Everingham & Co.,
Trego & Co.,
Rumsey & Chandler,
R. P. Murphy & Co.,
Smith — McFadden,
J. C. Smith & Co.,
H. C. King & Co.,
J. H. Lowry & Co.,
Aam Doll,
Bristol & Storms,
J. T. Leiber & Co.,
Murren Nelson & Co.,
A. H. Bliss & Co.,
W. R. Lynn,
Gilbert & Bugher,
Randell, Bell & Co.,
W. T. Baker & Co.,
Cohen & Co.,
Erskine & Morrison,
Roche, Andrews & Co.,
Gregg, Son & Co.,
F. G. Logan & Co.,
D. H. Dentout & Co.,
Ulrich, Busch & Co.,
M. B. Coom,
J. P. Sherwin & Co.,
H. D. Warner,
Rice & Palmer,
T. D. Outel & Co.,
M. B. Craft & Co.,
Pope & Davis,
C. E. Hill & Co.,
William P. Harvey & Co.,
W. Aug. Ray,
R. D. Bell & Co.,
Ed. Plows,
Gerstenburg & Co.,
Geo. C. Bell & Co.,
Bropen, Booth & Co.,
W. Hutchinson & Co.,
W. F. Ottendorf & Co.,
Harlow & Pettingill,

Bailey & Bullock & Co.,
Wm. Young & Co.,
B. J. McCleag & Co.,
Lyon & Co.,
McGoech, Everingham & Co.,
H. O. Goodrich,
H. M. Jones,
Crosby & Co.,
Mead & Beach,
McCormick, Adams & Co.,
Wm. M. Egan,
Fath, Ewald & Co.,
Billingsby & Nanson,
Smithes & Co.,
By E. VAN RYNER, *His Attorney.*

574 EXHIBIT B, MCHENRY.

J. W. Preston. W. E. McHenry.

Preston & McHenry, grain & provision commission merchants, # 5 & 7 Chamber of Commerce.

CHICAGO, *March 21st*, 1882.

We, the undersigned, Chas. J. Gilbert, Murray Nelson, and Wm. T. Baker, trustees of the creditors of Preston and McHenry, do hereby acknowledge the receipt of the first-mortgage bonds of the Cincinnati, Columbus and Hocking Valley railroad, said bonds being printed railway company, to the amount of eighty-three thousand nine hundred ($83,900.00) dollars, in compliance with and full satisfaction of the agreement of December 5th, A. D. 1881, entered into by said creditors and under and in accordance with the resolution adopted and the writing executed by said creditors February 13th, A. D. 1882, and constituting *as* such trustees, this receipt to cover only the names and amounts signed to the said agreement of February 13th, 1882, and now in our possession, the total amount of indebtedness as per said agreement being eighty-three thousand and $\frac{35}{100}$ dollars.

CHAS. J. GILBERT,
MURRAY NELSON,
WM. T. BAKER,
Trustees.

The words "said bonds being printed railway company" inserted before signing.

A. McCOY.

575 EXHIBIT C, HANNA.

CINCINNATI, *June 9th*, 1884.

To Thomas Hanna, Esq., receiver of the Cincinnati, Columbus and Hocking Valley railway.

DEAR SIR: We hereby propose to take charge and control of said railway in and agree to operate it to the best advantage practicable *on* our names and without expense whatever to you, moving the freight, carrying passengers, and giving the people along the daily mail, so as to connect with the eight o'clock morning train on the Pan Handle road going west to Cincinnati, and returning to leave

the western terminus of said C., C. & H. V. R'y for Jeffersonville immediately after the arrival of the wast-bound mail train which leaves Cincinnati on the Pan Handle route at or about 3 o'clock p. m. We also agree, if it shall seem necessary, to run a freight train over said road in the middle of the day each day, excepting Sunday, for the removal of freight, and especiallu to accommodate and develope the stone-quarry interest. We will keep the road in as good condition and repair as it now is, and will hold — harmless against any loss or damage, and we will not make any contract in your name or involve you in any liability. We will keep a strict account of the earnings and expenditures in the operation of the road, and you shall at all times have free access to the books of account.

Josiah Kirk and W. F. McKay will go our security to *to*
576 the amount of $1,000.00 for the faithful performance of this agreement on our part.

If you accept this proposition the contract between us shall become binding as soon as it is approved by the circuit court of the United States for the southern district of Ohio, and may be determined by either party giving to the other not less than ten (10) day-' notice of *of* his desire and intention to terminate the same.

J. H. KIRK.
ALFRED McKAY.

In presence of—
—— ——.
—— ——.

I accept the above proposition.

THOMAS HANNA,
Receiver C., C. & H. V. R. R. Co.

577 STATE OF OHIO, } *ss:*
Hamilton County, }

I, Albert S. Longley, appointed a special examiner in and for the above-entitled cause, do hereby certify that the above-named witnesses, Howard Eckert, James Ely, Albert P. Gahr, Thomas Hanna, E. L. Harper, Wm. H. Harper, D. P. Hyatt, J. H. Kirk, James H. Matthews, Wm. E. McHenry, Ralph Peters, John L. Pfau, J. W. Preston, W. T. Rosenbarger, E. Snowden, and Joseph W. Wilshire, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the testimony as above set forth was reduced to writing by me as above set forth, and that the same is all the testimony taken in said cause.

In testimony whereof I have hereunto set my hand and seal this 9th day of February, A. D. one thousand eight hundred and eighty-six.

ALBERT S. LONGLEY,
[SEAL.] *Notary Public in and for Hamilton Co., Ohio, and Special Examiner.*

Fees of referee, $249.80.

578 And afterwards, to wit, on the 30th day of July, A. D. 1886, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, p. 446.

It appearing to the court that said Josiah W. Preston, one of the complainants herein, has died since the commencement of this action, and that Emma C. Preston has been duly appointed and qualified as executrix of the last will and testament of the said Josiah W. Preston, deceased, on motion of counsel for complainants and by consent of all parties hereto, it is hereby ordered by the court that this action as to said Josiah W. Preston stand revived in the name of said Emma C. Preston as such executrix; that as such executrix she be substituted herein instead of said Josiah W. Preston, and that this action proceed in her favor accordingly.

And afterwards, to wit, on the 4th day of November, A. D. 1886, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal W, p. 523.

Upon applicatio- of Otto Greshman, Esq., attorney for the intervening petitioners, leave is granted Alfred Sulley to file an intervening petition herein, and the same is filed.

And afterwards, to wit, on the 4th day *day* of November, A. D. 1886, the following intervening petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

579 *Intervening Petition of Alfred Sulley.*

In the Circuit Court of the United States for the Southern District of Ohio.

JOSIAH W. PRESTON, EUGENE H. LAHEE
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILway Co., E. L. Harper, John S. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, and Lewis Seasongood, of Cincinnati, Ohio; W. D. Lee, John E. Gimperling, of Dayton, Ohio, and Geo. E. Clymer, of Kentucky. } # 3718.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio:

Your petitioner, Alfred Sulley, respectfully represents and shows unto your honors that he is a citizen and resident of the State of New York, and that he presents this petition as well on behalf of all of the creditors of the defendant The Cincinnati, Columbus and Hocking Valley Railway Company as on his own behalf.

Petitioner further shows that the defendant The Cincinnati,

Columbus and Hocking Valley Railway Co. is a corporation duly incorporated under the laws of the State of Ohio, having a capital stock of $560,000.00, divided into 5,600 shares of $100.00 each,
580 and was such corporation prior to the indebtedness hereinafter described.

Petitioner further shows that during the month of December, 1881, the Cincinnati, Columbus and Hocking Valley Railway Company made a mortgage upon all its franchises and property to the Union Trust Co. of New York as trustee to secure a series of bonds of 100.00, 500.00, and 1,000.00 each, aggregating in amount $560,000.00, which mortgage was duly recorded in the office of the recorder of the proper counties. The Cincinnati, Columbus and Hocking Valley Railway Co. issued its bonds to a number unknown to your petitioner, but aggregating in amount $560,000.00, dated January 2, 1882, wherein it promised to pay to the Union Trust Company of New York or bearer the amount of the face of said bonds, whether $100.00, $500.00, or $1,000.00, in 40 years after the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July. It was provided in said bonds and mortgage that in case of default for six months in the payment of any instalment of the interest on any of said bonds that then, at the option of the holder thereof, the principal of said bond became due and payable.

Petitioner further shows that on the — day of ——, 188–, by the order of this honorable court all the property and franchises of the defendant The Cincinnati, Columbus and Hocking Valley Railway Company were placed in the hands of a receiver; that afterwards, on the — day of ——, 188–, by the decree of this court the Cincinnati, Columbus and Hocking Valley Railway Co. was declared
581 to be insolvent and all its property and franchises ordered — sold to satisty the debts of said corporation; that on the — day of ——, 188–, all the property and franchises of said corporation were sold at public auction for $239,000.00, but that the amount was only sufficient to pay certain preferred claims and *and* a small dividend on the mortgage indebtedness aforementioned.

Petitioner further shows that he is the holder and owner of nine (9) of said bonds aforementioned, wherein the Cincinnati, Columbus and Hocking Valley Railway Company promised to pay to Union Trust Co. or bearer one thousand (1,000) dollars in forty years from the date thereof, viz., January 2, 1882, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July; that in each of said nine bonds it is provided that in case of a default in the payment of any installment of interest for six months that then the holder thereof might elect to declare the principal of said bond immediately due and payable; and petitioner avers that the instalment of interest falling due July 1, 1886, is still unpaid, and that there is now due and unpaid — said bonds ten thousand and fifty (10,050.00) dollars, including interest. A copy of said bonds, with an interest coupon attached, is filed herewith as Exhibit A, and it is prayed that the same may be taken as a part hereof.

And petitioner further shows that he purchased said bonds he now holds in the market as securities are purchased in the ordinary way, without any knowledge of the facts that *had* to the organization or of the corporate history of the Cincinnati, Columbus and Hocking Valley Railway Co.; that at the time said mortgage was
582 placed of record and said bonds issued said E. L. Harper was the subscriber for 2,500 shares of the capital stock of said defendant corporation, and before petitioner became the owner of said nine bonds he now holds said Harper became the owner of the remaining 3,100 shares of the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Co., and that said stock has never been fully paid for except as respondent alleges in his answer; but this petitioner avers and charges the fact to be that at the time said Harper conveyed said railroad to the Cincinnati, Columbus and Hocking Valley Railway Co. said railroad was wholly without rolling stock and the machinery necessary to conduct the business of a common carrier.

That by reason of the premises said Harper is liable to this petitioner and the other creditors of said corporation to an amount equal to the amount of the stock owned by him in addition to the amount unpaid thereon.

Wherefore petitioner prays that he may be allowed to intervene in this suit and share in the proceeds upon assuming his share of the expense of the same.

That the creditors of the company and the amount due each may be ascertained in such manner as the court may direct, and that said Harper may be directed to pay the balance he is in arrears upon the subscription to his stock, and if any deficit still remains to be paid the creditors that said Harper may be directed to pay said sum, but not exceeding an amount equal to the value of the stock by him held.

ALFRED SULLEY,
By OTTO GRESHAM,
His Solicitor.

583 UNITED STATES OF AMERICA, }
Southern Dist. of Ohio. }

—— ——, being duly sworn on, oath say- that he is the duly authorized attorney for Alfred Sully, the petitioner herein, and that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

—— ——.

Subscribed and sworn to before me this — of November, 1886.

—— ——.

—— ——.

EXHIBIT "A."

Number —.

UNITED STATES OF AMERICA, *State of Ohio.*

First Mortgage Six Per Cent. Forty Year Gold Bond.

The Cincinnati, Columbus and Hocking Valley Railway Co. hereby acknowledges itself indebted to the Union Trust Co. of New York or bearer in the sum of one thousand dollars in United States gold coin of or equivalent to the present standard, which sum it hereby promises to pay to the said Trust Co. or bearer, free of all United States or State taxes, on the 1st day of January, in the year one thousand nine hundred and twenty-two, at the office of said Trust Co., with interest -hereon at the rate of six per cent. per annum, payable semi-annually, in like gold coin, at the Metropolitan National Bank of New York, on the 1st day of January and
584 July in each year, on due presentation and surrender of the annexed coupons.

This bond is one of a series of the same date and tenor (except as to amount), the issue whereof is limited to twenty thousand dollars for each mile of standard-gauge railroad actually constructed, the payment whereof, with interest, is secured by a first mortgage on the said company's entire railroad, including the main trunk line built and to be built and all extensions of and branches of and from the main trunk line, and upon its road-beds, tracks, rights of way, franchises, chartered powers, fixtures, and appurtenances thereunto belonging or appertaining now owned or hereafter to be acquired for the use of said company, which mortgage has been executed in trust for the benefit of the holders of said bonds to the Union Trust Co. of New York as trustee and bears even date herewith. In case of non-payment of any installment of interest on this bond as the same becomes due the principal sum thereof shall, at the option of the holder, become due and payable at the expiration of six months, if such default so long continues, but no stockholder of said company shall be individually liable on this bond for principal or interest, and the said company hereby waives all right and benefit of any extension, stay, or appraisement laws which it might be entitled to upon any proceeding had upon default of any payment of principal or interest upon this bond.

This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed hereon and duly signed by the trustee.

585 In witness whereof the said railway company has caused its corporate seal to be hereto affixed and the same to be attested by the signatures of its president and secretary on the second day of January, in the year one thousand eight hundred and eighty-two.

[SEAL.] J. E. GIMPERLING, *President.*

J. H. MATTHEWS, *Secretary.*

Trustee's Certificate.

This certifies that this bond is one of the series described in the mortgage within referred to.

THE UNION TRUST CO. OF NEW YORK, *Trustee*,
By R. WD. W. KING, *President*.

Coupon.

$30. The Cincinnati, Columbus and Hocking Valley R'y Co. will pay to the bearer, at the Metropolitan National Bank of New York, on the first day of ——, ——, thirty dollars, in U. S. gold coin, for six months' interest on its 1st-mortgage bond for $1,000.

J. H. MATTHEWS, *Secretary*.

586 And afterwards, to wit, on the 24th day of January, A. D. 1887, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 23.

Leave is granted Martin Erwin to file his intervening petition herein, and the same is filed.

And afterwards, to wit, on the 24th d'y of January, A. D. 1887, the following intervening petition of Martin Erwin was filed in the clerk's office of said court. Said intervening petition is clothed in the words and figures following, to wit:

587 In the Court of the United States for the Southern District of Ohio.

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY COMPANY. } No. 3718.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, in chancery sitting:

Your petitioner, Martin Erwin, would respectfully represent and show unto your honors that he is a citizen and resident of the State of New York, and that he presents this petition as well on behalf of all the creditors of the Cincinnati, Columbus and Hocking Valley Railway Co. as on his own behalf.

This petitioner further shows that the defendant The Cincinnati, Columbus and Hocking Valley Railway Co. is a corporation duly incorporated under the laws of the State of Ohio, having a capital stock of $560,000.00 divided into 5,600 shares of $100, and was such corporation prior to the indebtedness hereinafter described.

This petitioner further shows that during the month of December, 1881, the defendant The Cincinnati, Columbus and Hocking Valley

Railway Co. made a mortgage upon all its franchises and
588 property to the Union Trust Co. of New York, as trustee, to secure a series of bonds of $100, $500, and $1,000 each, aggregating in amount to $560,000.

This mortgage was duly recorded in the office of the recorder of the proper counties. The Cincinnati, Columbus and Hocking Valley Railway Company issued its bonds to a number unknown to this petitioner, but aggregating in amount to $560,000.00, dated Jan'y 2, 1882, wherein it promised to pay to said Union Trust Company of New York, as trustee, or bearer the amount of the face of said bond, whether $100.00, $500.00, or $1,000.00, in 40 years after the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually on the first days of January and July. It was provided in said bonds and mortgage that in case of default for six months in the payment of any instalment of the interest on any of said bonds that then, at the option of the holder thereof, the principal of said bond became due and payable.

This petiti-ner further shows that on the — day of ——, 188–, by the order of this honorable court all the property and franchises of the defendant The Cincinnati, Columbus and Hocking Valley Railway Co. were placed in the hands of a receiver, said company having made default in the payment of interest on the bonds aforementioned; that afterwards by the findings and decree of this court the Cincinnati, Columbus and Hocking Valley Railway Company was declared to be insolvent, and all its property and franchises were ordered sold at public auction to satisfy the debts of said
589 corporation; that on the — day of ——, 188–, all the property and franchises of said corporation were sold at public auction for the sum of $29,500, which will be little more than sufficient to pay certain claims which the court decreed to be prior in equity to the mortgage indebtedness of said corporation.

This petitioner further shows that he is the holder and owner of eleven (11) of said bonds, a copy of which is attached hereto as Exhibit A, wherein the Cincinnati, Columbus and Hocking Valley Railway Company promised to pay to the Union Trust Co. or bearer one thousand dollars in forty years from the date thereof, viz., January 3, 1882, with interest at the rate of 6 per cent. per annum, payable semi-annually on the first days of January and July; that in each of said eleven (11) bonds it is provided that in case of default in the payment of any instalment of interest for six months that then the holder thereof might elect to declare the principal of said bonds immediately due and payable; and this petitioner avers that the installment of interest falling due on the — day of ——, 188–, has never been paid, and he elects to declare the principal of said bonds due and payable.

This petitioner further avers that at the time said mortgage was placed of record and said bonds issued said E. L. Harper was the subscriber for 2,500 shares of the capitao stock of said defendant corporation. As to the remaining 3,100 shares of the capital stock of said defendant company this petitioner does not know to whom

the same belonged except as set forth in the answer of said
590 defendant Harper, wherein he alleges that he was the owner of the entire issue of the capital stock, to wit, $560,000.00, of the Cincinnati, Columbus and Hocking Valley Railway Co.; and petitioner alleges that the same has never been fully paid up, but that a large amount thereof was issued to said Harper and other parties, who paid nothing at all for the same.

By reason of the premises the said individual defendants are liable to petitioner and the other creditors of the corporation to an amount equal to the amount of stock owned by each, in addition to the amounts remaining unpaid on their respective subscriptions.

Wherefore petitioner prays that he may be allowed to intervene in this suit and share in the proceeds upon assuming his share of the expense of the same; that the creditors of the company and the amount due each may be ascertained in such manner as the court may direct, and that all stockholders in arrears for subscription to stock may be required to pay the balance due from them respectively, and that each stockholder be required to pay his ratable proportion of any deficit remaining after the application of the assets to said debts to the amount of his stock.

MARTIN ERWIN,
By OTTO GRESHAM,
His Solicitor.

591 EXHIBIT "A."

Number —.

UNITED STATES OF AMERICA, *State of Ohio.*

First-Mortgage Six Per Cent. Forty-Year Gold Bond.

$1,000.

The Cincinnati, Columbus and Hocking Valley Railway Co. hereby acknowledges itself indebted to the Union Trust Co. of New York or bearer in the sum of one thousand dollars, in United States gold coin, of or equivalent to the present standard which sum it hereby promises to pay to the said trust Co. or bearer, free of all United States or State taxes on the 1st day of January, in the year one thousand nine hundred and twenty-two, at the office of said trust Co. with interest hereon at the rate of six per cent. per annum payable semi-annually in like gold coin at the Metropolitan National Bank of New York on the 1st day of January and July
592 in each year on due presentation and surrender of the annexed coupons.

This bond is one of a series of the same date and tenor, (except as to amount) the issue whereof is limited to twenty thousand dollars for each mile of standard-gauge railroad actually constructed the payment whereof, with interest is secured by a first mortgage on the said company's entire railroad including the main trunk line built and to be built and all extensions of and branches of and from the main trunk line, and upon its road-beds, tracks, rights of way fran-

chises chartered powers, fixtures and appurtenances thereunto belonging or appertaining now owned or hereafter to be acquired for the use of said company, which mortgage has been executed in trust for the benefit of the holders of said bonds to the Union Trust Co. of New York as trustee, and bears even date herewith. In case of non-payment of any installment of interest on this bond, as the same becomes due, the principal sum thereof shall, at the option of the holder, become due and payable at the expiration of six months if such default so long continues but no stockholder of said company shall be individually liable on this bond for principal or interest, and the said company, hereby waives all right and benefit of any extension, stay, or appraisement laws which it might be entitled to upon any proceeding had upon default of any payment of principal or interest upon this bond.

This bond shall not become obligatory until it shall have been authenticated by a certificate endorsed hereon and duly signed by the trustee.

593 In witness whereof, the said railway company has caused its corporate seal to be hereto affixed and the same to be attested by the signatures of its president and secretary on the second day of January in the year one thousand eight hundred and eighty-two.

[SEAL.] J. E. GIMPERLING, *President.*

J. H. MATTHEWS, *Secretary.*

Trustee's Certificate.

This certifies that this bond is one of the series described in the mortgage within referred to.

THE UNION TRUST CO. OF NEW YORK, *Trustee,*
By ED. W. KING, *President.*

594 STATE OF NEW YORK, }
County of New York, } *ss.:*

Martin Erwin, being first duly sworn, on oath says that the facts set forth in the foregoing petition are true as he verily believes.

MARTIN ERWIN.

Subscribed and sworn to before me this 20th day of January 1887.

MOSES S. HYMAN,
Notary Public, New York County. [SEAL.]

595 And afterwards, to wit, on the 14th day of February, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of E. L. Harper.

United States Circuit Court for the Southern District of Ohio.

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY R. R. Co. *et al.* } #3718.

Answer of E. L. Harper and others to the intervening petition of Martin Erwin.

To the honorable the judges of said court, in chancery sitting:

Said E. L. Harper and the other defendants, whom the bill alleges were stockholders in said railroad Co., for answer to said intervening petition say that they adopt the allegations of their answer herein, filed ——, 188–, and make them part of this answer, and, further answering, allege that it is not true that any part of the subscription to the capital stock of said company remained unpaid.

These defendants deny that they are individually liable to any creditors on said bonds or any part thereof for this, that said bonds each and all provide, as part of the terms and conditions thereof, that no stockholder of said company shall be individually
596 liable on said bonds for *for* principal or interest, and said bonds were received and accepted by the holders thereof subject to said conditions.

JORDAN & JORDANS,
Attorneys for said Defendants.

STATE OF OHIO, *Hamilton County,* } *ss:*

E. L. Harper, being duly sworn, says the statements of this foregoing answer are true.

E. L. HARPER.

Sworn to before me by E. L. Harper and signed by him in my presence January 31, 1887.

JOSEPH E. O'HARRA,
[SEAL.] *Notary Public in and for Hamilton County, Ohio.*

And afterwards, to wit, on the 26th day of February, A. D. 1887, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 88.

The default of E. L. Harper *et als.* to the intervening petition of Alfred Sulley herein is hereby set aside and leave given them to file their answer thereto, which is accordingly done, and said answer is hereby received and filed.

And afterwards, on the 26th day of February, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of E. L. Harper and Others.

597 United States Circuit Court for the Southern District of Ohio. Western Division.

JOSIAH W. PRESTON *et als.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY R. R. Co. *et als.* } # 3718.

Answer of Edward L. Harper and others to the intervening petition of Alfred Sulley.

To the honorable the judges of said court, in chancery sitting:

Said E. L. Harper and the other defendants whom the bill alleges were stockholders in said railroad company for answer to said intervening petition say that they adopt the allegations of their answer herein filed ——, 188–, and make them part of this answer, and, further answering, allege that it is not true that any part of the subscription to the capital stock of said company remained unpaid.

These defendants deny that they are individually liable to any creditors on said bonds or any part thereof for this, that said bonds each and all provide as part of the terms and conditions thereof that "no stockholder of said company shall be individually liable on said bonds for principal or interest," and said bonds were received and accepted by the holders thereof subject to said conditions.

JORDAN & JORDANS,
Sol. for Def'ts.

598 And afterwards, to wit, on the 21st day of April, A. D. 1887, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Reply.

In the Circuit Court of the United States for the Southern District of Ohio.

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY R'Y Co. *et al.* } # 3718.

The replication of Alfred Sulley to the answer of the defendant Ed. L. Harper.

This repliant, saving and reserving to himself all manner of benefit and advantage of exception which may now be had or hereafter taken to the manifold insufficiencies of said plea, for the repli-

cation thereunto says he will aver, maintain, and prove his petition to be true and sufficient in law, and that the said answer of E. L. Harper is untrue and insufficient to be replied unto by this repliant.

OTTO GRESHAM,
Sol. for Def'ts.

599 STATE OF OHIO, } ss:
Hamilton Co., }

E. L. Harper, being duly sworn, says that the statement- of the foregoing answer are true.

E. L. HARPER.

Sworn to before me by E. L. Harper and signed by him in my presence this February 26, 1887.

JOS. W. O'HARRA,
[SEAL.] *Notary Public in and for Ham. Co., Ohio.*

And afterwards, to wit, on the 21st day of April, A. D. 1887, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Reply.

In the Circuit Court of the United States for the Southern District of Ohio.

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY R'Y Co. *et al.* } #3718.

The replication of Martin Erwin to the answer of the defendant Ed. L. Harper.

This repliant, saving and reserving to himself all manner of benefit and advantage of exception which may now be had or hereafter taken to the manifold insufficiencies of said plea, for the rep-
600 lication thereunto says he will aver, maintain, and prove his petition to be true and sufficient in law, and that the said answer of E. L. Harper is untrue and insufficient to be replied unto by this repliant.

OTTO GRESHAM,
Sol. for Def'ts.

And afterwards, to wit, on the 26th day of May, A. D. 1887, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

Circuit Court of the United States, Southern District of Ohio, Western Division.

JOSIAH W. PRESTON *et al.*
vs.
E. L. HARPER *et al.*
} In Equity. # 3718. Motion.

The complainants now come and move the court for leave to withdraw their replication filed herein and for leave to amend their bill of complaint.

FRANCIS A. RIDDLE,
PAXTON & WARRINGTON,
BOYCE & BOYD,
Solicitors for Complainants.

601 And afterwards, to wit, on the 31st day of May, A. D. 1887, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 216.

This day this cause came on to be heard on the motion of complainants for leave to withdraw their replication and to file an amendment to their bill of complaint and upon the proofs offered, and was argued by counsel for complainants and by counsel for defendants; on consideration whereof the court, being fully advised in the premises, hereby grants the said motion upon the terms that the complainants pay all the costs of the case up to this date, excepting the costs of depositions and of taking the evidence before the examiner appointed herein.

The complainants are allowed ten days from the date of the entry hereof in which to comply with the terms above named and to file their amendment.

And the defendants are allowed 30 days after the filing of such amendment in which to answer or demur.

And afterwards, to wit, on the 7th day of June, A. D. 1887, the following amendment to bill was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amendment to Bill.

Circuit Court of the United States, Southern District of Ohio, Western Division.

JOSIAH W. PRESTON *et al.*, Complainants,
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY CO. *et al.*, Defendants.
} In Equity. # 3718.

602 Amendment to bill.

And the said complainants, by way of amendment to their bill of complaint filed in said cause, leave of the court having been first obtained, further complaining, say—

1st. At end of 17th line of page 14, after word "described," insert the following:

That after the said corporation was organized and its board of directors, below named, had been elected the said E. L. Harper submitted to said board of directors a certain proposition in words and figures following:

"To the board of directors of the Cincinnati, Columbus and Hocking Valley Railway Co.

"GENTLEMEN: I hereby propose to broaden the gauge of the road now owned by me to a standard gauge and extend the same on the west to near Corwin, on the Little Miami road, and also to extend the east end to Jeffersonville, on the Springfield Southern road, say about 30 miles of railroad, and hereby agree to sell the same to your company for eighteen hundred thousand (1,800,000) dollars, of the par value of the securities of your company, as follows, viz:

"Six hundred thousand ($600,000) of the 1st mortgage, forty (40) years, *at* six per cent. (6%) bonds, issued at the rate of twenty thousand (20,000) per mile of constructed road.

"Six hundred thousand (600,000) of the income bonds, issued at the rate of twenty thousand (20,000) per mile of constructed
603 road, and six hundred thousand (600,000) of the capital stock, including subscriptions already subscribed.

"(Signed) E. L. HARPER.

"Cincinnati, Ohio, December 13th, 1881.

"This proposition is based on thirty (30) miles of road. If actual measurement is less than thirty, proportionate allowance will be made.

"(Signed) E. L. HARPER."

Which said proposition said E. L. Harper claims was accepted by said defendant railway company, and the board of directors of said defendant com-any on said 13th day of December, 1881, at their first meeting, did in fact accept said proposition, subject to ratification by the stockholders of said company; and afterwards, to wit,

on January 2nd, 1882, at a meeting of stockholders of said company the seven directors of said company and no other stockholders—each holding only one share of stock of the par value of one hundred dollars per share and two of them acting by defendant E. L. Harper—voted as such stockholders to ratify said action of the board of directors in accepting said proposition, and on or about the date last aforesaid the said defendant, E. L. Harper, delivered to said railway Co. a deed conveying to it the said railroad, which deed bears date December 31, 1881, and was executed by said defendant, E. L. Harper, and his wife, the said Harper signing thereto his full name of Edward L. Harper, and the board of directors
604 of said company, at the same time and as part of the same transaction, caused to be executed and delivered to said E. L. Harper the bonds mentioned in said proposition, after first securing said bonds by mortgage or trust deed covering and conveying said railway property.

Your orators further show that at the time said proposition was submitted to said defendant company each one of said board of directors was either in the employment and under the pay of said E. L. Harper or otherwise under his direction and control; that the pretended acceptance by them, as such board of directors, of said proposition was in fact the act of him, the said E. L. Harper, accepting his own proposition and was conducted and carried on for sole purpose of enabling said E. L. Harper and the other defendants who subscribed for the capital stock of the said defendant railway Co. as aforesaid to avoid and escape their liability as such subscribers to the capital stock of said corporation and of defrauding and defeating the rights of your orators, some of whom the said E. L. Harper and other defendants last mentioned then well knew were to be and would be creditors of said corporation, and of all others becoming creditors thereof, all of which acts and proceedings so carried on by and between the said E. L. Harper and said board of directors were had and conducted without the knowledge or consent of your orators and in fraud of the rights of creditors of said company.

And your orators aver that at the time such pretended accept-
605 ance by said board of directors of said proposition, together with all things to be done by said E. L. Harper in relation thereo under his said proposition, — was not worth one-fiftieth ($\frac{1}{50}$) part of the amount of the bonds and mortgages issued thereon by the defendant railway Co. to said E. L. Harper in pretended payment therefor, as was then well known by said E. L. Harper and said directors and by every stockholder who voted on said proposition, and your orators charge the fact to be that in considering and acting on said proposition no regard whatever was paid by said board of directors or by any stockholder voting thereon to the actual value of the property so to be conveyed to said corporation by said E. L. Harper in exchange for said bonds and for the proposed surrender and release to said E. L. Harper and said other subscribers of their said stock subscriptions, but, on the contrary, the said directors and stockholders voting thereon voted and acted in relation thereto solely at the direction and dictation of said E. L.

Har-er and in his and their individual interest and behalf and in disregard of the rights and interests of the corporation they pretended to represent and for the purpose of shielding and protecting said E. L. Harper and themselves from their due and lawful liability to the complainants herein and to creditors of said corporation on account of their aforesaid subscriptions to its capital stock, and said proposition and the acceptance thereof in the form and manner hereinabove set forth were and are fraudulent and void as against the rights of your orator.

606 Second. After the word "pray," in the 23rd line of page 15 of said bill of complaint, insert the following:

That the aforesaid pretended agreement by and between the said E. L. Harper and said The Cincinnati, Columbus and Hocking Valley Railway Co. and its directors, whereby the said board of directors assumed to release or otherwise treat as paid and discharged the liability of said E. L. Harper and themselves to said defendant railway company on account of their subscriptions to its capital stock, may be annulled and set aside and declared to be void and of no effect as against the rights of your orators as creditors of said defendant railway company as aforesaid, and—.

FRANCIS A. RIDDLE,
PAXTON AND WARRINGTON, AND
BOYCE AND BOYD,
Solicitors for Complainants.

STATE OF OHIO, } *ss*:
Hamilton County, }

Before me, the undersigned, a notary public in and for said county, personally appeared W. F. Boyd, who, being duly sworn, on his oath says that he is one of the solicitors in the above-entitled cause; that the complainants are all non-residents of and absent from the State of Ohio; that he has read the foregoing amendment to the bill of complaint and knows the contents thereof to be true except as to such matters as are therein stated on information and belief, and as to these things he believes them to be true.

W. F. BOYD.

607 Subscribed and sworn to before me this 7th day of June, 1887.

HENRY T. LIPPARD,
Notary Public in and for Hamilton County, Ohio. [SEAL.]

And afterwards, to wit, on the 7th day of July, A. D. 1887, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of E. L. Harper.

Circuit Court of the United States, Southern District of Ohio, Western Division.

JOSIAH W. PRESTON *et al.*, Complainants,
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY CO. *et al.*, Respondents.

Answer of E. L. Harper to Amendment to Bill.

Now comes defendant E. L. Harper and for answer to complainants' amendment to their bill herein admits that he made
608 the proposition to said railway company as set out in said amendment, and that the same was accepted by said company and ratified by its stockholders; that said road was conveyed by this defendant, E. L. Harper, to said company; that said bonds and mortgage securing them were executed, and that said board of directors were either employed by or related to this defendant; but he denies that the action of said board of directors was the action of said defendant, E. L. Harper, but the *value* was just what it purported to be, the act of said railway company; and he alleges that the object, well known to complainants, was to put said company in a position where it could execute the bonds which said Harper agreed to transfer to said Preston and others.

It is true that said Harper knew that said Preston and others were to become creditors of said corporation by taking a transfer of said bonds, but it is also true that said Preston and others, parties to said contract, and who became the recipient- of said bonds, knew at the time of the making of said contract and agreed with said Harper that he should have and become the owner of all the stock of said company, as well as said bonds, as the consideration for the transfer of said road to said company.

Said Preston and others knew that there was to be no money paid on any subscription to the capital stock of said company; that the subscription to the capital stock was a mere matter of form and was adopted simply as a mode of creating a corporate organization that
609 could issue bonds, and he denies that the same was done in fraud of the rights of said Preston and others. He alleges that said Preston & others had full knowledge of the value of said road and the securities covered by said mortgage.

He admits that said board of directors carried out his wishes in accepting said proposition, and alleges that it was in pursuance of the wishes and understanding of said Preston and others that just such a contract should be made with said company by said Harper and for just such a purpose and for the consideration expressed therein, and he denies that there was any fraudulent purpose in it.

This defendant adopts all of the allegations of his answer to the original bill and makes them part hereof, and denies each and

every allegation of said amendment to said bill not herein admitted and asks to be dismissed.

JORDAN & JORDANS,
Attorneys for E. L. Harper.

STATE OF OHIO, }
Hamilton County, } *ss:*

E. L. Harper, being duly sworn, deposes and says that all the several matters and things which are set forth in the foregoing answer as from the information of others he believes to be true, and that all the several other matters and things therein set forth are true in substance and in fact.

E. L. HARPER.

Sworn to and subscribed before me this 7th day of July, A. D. 1887.

JOS. W. O'HARRA,
Notary Public in and for Hamilton Co., Ohio. [SEAL.]

610 And afterwards, to wit, on the 30th day of July, A. D. 1887, the following replication was filed in the clerk's office of said court, coothed in the words and figures following, to wit:

Replication.

JOSIAH W. PRESTON, EUGENE H. LAHEE, William E. McHenry, Charles J. Gilbert, William T. Baker, Murry Nelson, Abram Pool, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, Complainants,
vs.
THE CINCINNATI, COLUMBUS AND HOCKING Valley Railway Company, Edward L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, Lewis Seasongood, W. D. Lee, and John F. Gimperling, Defendants. } 3718. In Equity.

The replication of Emma C. Preston, executrix of the will and estate of Josiah W. Preston, deceased; Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, William T. Baker, Murry Nelson, Abram Poole, Elmore A. Kent, Selah Young, Jr., and James
611 S. Sherman, complainants, both to the original answer of the defendants above named, and also to the answer filed herein by said defendants to the amendment to the bill of complaint.

These repliants, saving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto say that they will aver and prove their said bill and their said amendment thereto to be true, certain, and sufficient in the law to be answered unto, and that the said an-

swers of the said defendants are uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or things whatsoever in the said answers contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill and the amendment thereto they have already prayed.

FRANCIS A. RIDDLE,
PAXTON & WARRINGTON,
BOYCE AND BOYD,
Solicitors for Complainants.

612 And afterwards, to wit, on the 28th day of March, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 573.

Leave is hereby granted complainants to file their supplemental bill.

And afterwards, to wit, on the 28th day of March, A. D. 1888, the following supplemental bill was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Supplemental Bill.

613 Circuit Court of the United States for the Southern District of Ohio, Western Division.

To the judges of the circuit court of the United States for the southern district of Ohio, western division:

Emma C. Preston, adm'r'x of the estate of Josiah W. Preston, deceased; Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, W. T. Baker, Murray Nelson, Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, who are citizens of the State of Illinois and residents of the city of Chicago, in said State, brings this their supplemental bill against H. P. Lloyd, a citizen of the State of Ohio, residi*d*ing in city of Cincinnati, in said State, and trustee of E. L. Harper.

And thereupon your said orator- complain and say that they filed their original bill against E. L. Harper and others in this court on June 5, 1885, and their amendment to said bill on June 7, 1887, in case No. 3718 on the docket of the above-mentioned court, wherein they prayed for judgment and decree against said Harper and others, defendants therein named, requiring them to pay the amount due upon certain stock subscriptions for three thousand shares of the capital stock of the Cincinnati, Columbus and Hocking Valley Railway Company and for other relief, as stated in said bill
614 and amendment thereto.

And your orators further show that since the filing of their

said original bill and their said amendment thereto, at the dates above mentioned, the said E. L. Harper did, to wit, on the 21st day of June, 1887, make an assignment for the benefit of his creditors, purporting to convey and transfer all and singular his property under and according to the insolvent laws of the State of Ohio, and that the said H. P. Lloyd has been duly appointed and qualified and is now acting as the sole trustee of all the property so conveyed and transferred.

To the end, therefore, that the said defendant, H. P. Lloyd, may, if he can, show why your orators should not have the relief in their said original bill and amendment thereto prayed, they pray that the said defendant as such trustee may be made a party defendant to said cause and required to answer the premises and show cause, if any he can, why your orators should not have the relief and judgment and decree as prayed in their said original bill and amendment thereto, and that he be required to allow as against the property and estate so in *his* possession and control of the said E. L. Harper any judgment or decree which may be entered in said cause in favor of your orators or any of them, and that they be granted such other and further relief in the premises as equity may require.

FRANCIS A. RIDDLE,
BOYCE AND BOYD,
PAXTON AND WARRINGTON,
Att'ys for Complainants.

615 United States Circuit Court, Southern District of Ohio, Western Division.

EMMA C. PRESTON, Adm'r'x, etc., *et al.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY COMPANY *et al.*
No. 3718.

STATE OF OHIO, *Hamilton County*, } ss:

William E. McHenry, being first duly sworn, on oath says that he has read the foregoing supplemental bill in said cause and knows the contents thereof to be true in substance and in fact.

WILLIAM E. McHENRY.

Sworn to and subscribed before me this 25th day of October 1887.

JOHN D. MEEKER,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

And afterwards, to wit, on the 28th day of March, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 573.

616 Leave is hereby granted counsel for defendants, upon application to the court, to file their answer and cross-bill herein.

And afterwards, to wit, on the 28th day of March, A. D. 1888, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

Circuit Court of the United States, Southern District of Ohio, Western Division.

EMMA G. PRESTON, Adm. of the Estate of Josiah W. Preston, Deceased, *et al.*, Complainants,
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY Co. *et al.*, Respondents.

Answer and cross-bill of Harlan P. Lloyd, trustee of the estate of Edward L. Harper, to the original bill, the amended bill, and the supplemental bill and to the intervening bills filed in this case.

Harlan P. Lloyd, trustee of the estate of Edward L. Harper, having been made a party defendant in this case, by way of
617 answer to said original bill, amended bill, the supplemental bill and the intervening bills, says that the said Edward L. Harper did, on the 21st day of June, 1887, being then insolvent, make an assignment of all his property and estate to Eugene Zimmerman for the benefit of his creditors, and that said Zimmerman accepted said assignment, but afterward resigned his trust as assignee, and thereupon the probate court of Hamilton county, in the State of Ohio, in pursuance of the statute *in* said State in such case made and provided, appointed the said Harlan P. Lloyd trustee of said Harper's said property and estate for the benefit of his creditors, and that said Harlan P. Lloyd gave bond and security as required by said court, and which was duly approved by said court, and he was duly qualified as said trustee and entered upon his duties as such.

This respondent, in further answering, denies the validity of the claim of the complainants and of all other parties hereto against the said Harper or this respondent, and alleges that the only consideration on which said claim or claims were founded was a gaming transaction in the form of a deal in options in wheat in the market of the city of Chicago, in the State of Illinois, in which gaming transaction there was no wheat actually owned or bought or sold, but only a betting on the future prices of wheat in said market, in which the said complainants won from said Harper, between the 1st day of January, 1881, and the 1st day of October, 1881, very large sums of money, amounting in the aggregate to more than $600,000.00, of

which the said Harper actually paid in cash or its equivalent not less than $400,000.00, and that this claim of the complain-
618 ants for $214,000.00 asserted in said complainants' petition was for the pretended balance of said winnings at gaming by said complainants in said betting transactions in the said Chicago markets and for which the said Harper gave to the said complainants certain bonds of the said railroad company to the said amount of $214,000.00, on which bonds said judgments referred to in said petition were founded and on no other consideration whatever.

This respondent further says that, by the laws of the State of Illinois, as well as by the laws of the State of Ohio, the said betting contracts and gaming transactions are utterly void, and the loser who has paid money on account of such losses is entitled to recover the same back.

This respondent therefore prays that all the said petitions of the complainants be dismissed with costs.

And by way of cross-bill this respondent says that the said complainants, Emma C. Preston, adm'r'x of the estate of Josiah W. Preston; Wm. E. McHenry, and Eugene H. Lahee, are indebted to this respondent, as the representative of the estate of said Harper, for money had and received by said complainants from the said Edward L. Harper prior to the assignment by said Harper in the sum of $400,000.00, which amount was won by said complainants from said E. L. Harper in betting as aforesaid on the prices of wheat in the market in the city of Chicago, in the State of Illinois, between the 1st day of January and the 1st day of October, in the year 1881, and which said amount was paid by said Harper to said complainants in money.

619 Wherefore this respondent prays that by the consideration of this court he may have a decree and judgment for said amount in his favor and against these said complainants, Emma C. Preston, admr. of the estate of Josiah W. Preston, deceased; Wm. E. McHenry, and Eugene H. Lahee, and for his costs in this behalf expended.

TAFT & LLOYD,
Att'ys for H. P. Lloyd, Trus. of E. L. Harper.

STATE OF OHIO, }
Hamilton County. } ss:

Harlan P. Lloyd, being duly sworn according to law, says that he is the duly appointed trustee of the estate of Edward L. Harper, and that he believes the statements made in his foregoing answer and cross-bill as such trustee to be true.

HARLAN P. LLOYD.

Sworn to before me and subscribed in my presence this 28 day of March, A. D. 1888.

[SEAL.] WM. S. WALKER,
Notary Public, Hamilton County, Ohio.

And afterwards, to wit, on the 28th day of March, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal X, p. 573.

Upon application of counsel for complainants leave is granted to file exceptions and also motion and demurrer herein.

And afterwards, to wit, on the 28th day of March A. D. 1888, the following exception was filed in the clerk's office of said
620 court, clothed in the words and figures following, to wit:

Exception to Answer of Lloyd, Trustee.

Circuit Court of the United States, Southern District of Ohio, Western Division. In Equity.

EMMA C. PRESTON, Administratrix of the Estate of Josiah W. Preston, Dec'd, *et al.*, Complainants,
vs.
THE CINCINNATI, COLUMBUS & HOCKING VALLEY RAILROAD COMPANY *et al.*, Defendants. } No. 3718.

Exceptions taken by the complainants to the insufficient answer of the defendant Harlan P. Lloyd, trustee, etc., to the complainants' original bill, amended bill, and supplemental bill.

First. For that the defendant Harlan P. Lloyd, trustee of the estate of Edward L. Harper, has not, to the best and utmost of his knowledge, remembrance, information, and belief, answered and set forth whether or not the facts stated in said original bill, amended bill, and supplemental bill are true, excepting an admission that the judgments referred to in the original bill were obtained as therein alleged.

621 Second. For that the said defendant has not in manner aforesaid answered and set forth whether or not the said Edward L. Harper in fact subscribed to the capital stock of the Cincinnati, Columbus & Hocking Valley Railway Company in the amount and under the circumstances set forth in said original and amended bills of the complainants, or whether or not said Harper ever paid to said railway company the amount of said subscription either in money or in money's worth, and has not in manner aforesaid shown any facts which would relieve said Harper or said Lloyd as Harper's trustee as aforesaid from his obligation on said subscription to the complainants as owners of unsatisfied judgments against said railway company.

Third. For that the said defendant has set forth in said answer, from the words "this respondent, in further answering, denies the validity of the claim of the complainants" to and inclusive of the words "and the loser who has paid money on account of such

losses is entitled to recover the same back," allegations and matters which are totally immaterial and irrelevant, in that they relate to transactions which are alleged to have occurred prior to and as a consideration for the issue of certain bonds upon which it is alleged in said answer were recovered, the judgments — which are mentioned and set out in said original and amended bills.

In all which particulars the complainants except to the answer of the said defendant, Harlan P. Lloyd, trustee as aforesaid, as evasive, imperfect, and insufficient, and pray that the said defendant may be compelled to put in a full and sufficient answer thereto.

FRANCIS A. RIDDLE,
BOYCE AND BOYD AND
PAXTON AND WARRINGTON,
Counsel for Compl'ts.

622 And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following motion, clothed in words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Western Division. In Equity.

EMMA C. PRESTON, Administratrix of the Estate of Josiah W. Preston, Dec'd, *et al.*, Complainants,
vs.
THE CINCINNATI, COLUMBUS & HOCKING VALLEY RAILROAD COMPANY *et al.*, Defendants.
} No. 3718.

Motion.

Now come the complainants and move the court to order to be stricken out as irrelevant and impertinent that part of the answer of Harlan P. Lloyd, trustee of the estate of Edward L. Harper, commencing with the words "this respondent, in further answering, denies the validity of the claim of the complainants" and thence to and including the words "and the loser who has paid on account of such losses is entitled to recover the same back."

FRANCIS A. RIDDLE,
BOYCE AND BOYD,
PAXTON AND WARRINGTON,
Counsel for Complainants.

623 And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following demurrer, clothed in words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Western Division. In Equity.

EMMA C. PRESTON, Administratrix of the Estate of Josiah W. Preston, Dec'd, *et al.*, Complainants,
vs.
THE CINCINNATI, COLUMBUS & HOCKING VALLEY RAILROAD COMPANY *et al.*, Defendants.
} No. 3718.

Demurrer of the Complainants to the Cross-Bill of Harlan P. Lloyd, Trustee of Edward L. Harper.

The complainants, by protestation, not confessing any or all of the matters and things in the cross-bill of the defendant Harlan P. Lloyd, trustee of Edward L. Harper, contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said cross-bill, and for cause of demurrer show:

1. That the allegations of said cross-bill are claimed and the decree prayed thereon is sought against only part of the complainants.

2. That the matters and things set out in said cross-bill have no connection with those set out in the original and
624 amended bill- herein, and, if valid, cannot be used as a set-off herein.

3. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the said Lloyd, trustee, and relief against these complainants or either of them.

Wherefore, and for divers other good causes of demurrer appearing in the said cross-bill, the complainants demur thereto and humbly demand the judgment of the court whether they shall be compelled to make any further or other answer to the said cross-bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

FRANCIS A. RIDDLE,
BOYCE & BOYD,
PAXTON AND WARRINGTON,
Counsel for Complainants.

We hereby certify that we are of counsel for the complainants in the above-entitled cause, and that, in our opinion, the foregoing demurrer of complainants to the cross-bill of Harlan P. Lloyd, trustee, is well founded in point of law and properly filed in the above cause.

PAXTON & WARRINGTON.
BOYCE AND BOYD.

624½ And afterwards, to wit, on the 28th day of August, A. D. 1888, the following opinion of Judge Sage was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge Geo. R. Sage.

U. S. Circuit Court, S. D. O., Western Division.

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COLUMBUS AND HOCKING VALLEY RAILWAY CO., E. L. HARPER, *et al.* } #3718. In Chancery.

SAGE, *Judge:*

This is a creditor's bill to subject the amount due to the defendant railway company from the defendant E. L. Harper and his codefendants upon their subscriptions to the capital stock of said company to the payment of complainants' judgment against said company amounting to $255,938.48.

The railway company was incorporated and organized in the latter part of the year 1881. On the 10th of Dec. of that year defendant E. L. Harper subscribed for 2,500 shares of its capital stock of the par value of $100 each, and caused eight codefendants, as he states in his answer, to subscribe for one share each to enable them to become directors. Subsequently certificates representing
625 3,000 shares of the capital stock were issued by the company to defendant W. D. Lee at the special instance and request of defendant E. L. Harper and for his use and benefit. No money was paid upon any of the subscriptions nor for the 3,000 shares issued to Lee for account of Harper, but they were regarded by him and by the company as fully paid for in the manner following:

At the date of the organization of the company Harper was the owner of a narrow-gauge railroad which had been bought from an insolvent railroad company by purchasers who sold it to him, as he testifies, for "about scrap-iron price." It was some twenty miles in length, had never paid operating expenses, and was worth just about what the rails, which were light and worn, would bring for scrap iron. On the 13th December, 1881, at the first meeting of the board of directors, Harper submitted a proposition in writing to broaden the *guage* of this road to standard *guage* and extend it on the west to the Little Miami railroad at a point near Corwin and on the east to Jeffersonville, on the Springfield Southern road, say about thirty miles of railroad, and to sell the same to the company for $1,800,000 of the par value of the securities of the company as follows: $600,000 of its 1st-mortgage bonds, $600,000 income bonds, and $600,000 of the capital stock, "including subscriptions already subscribed."

A motion to accept this proposition, subject to retification by the stockholders of the company, was promptly made and unanimously carried. Harper testifies that it was agreed with all the di-
626 rectors and all the stockholders before the company was organized that nothing was to be paid in cash upon the stock subscriptions, and that the directors "were to assist in the organization or be promoters in this enterprise" for the purpose of enabling him to carry out his contract of October 12 with J. W. Preston &

Co. & others to organize said company to change the guage of his railroad to standard guage, to extend the road as hereinbefore stated, to convey it to said company, to cause the company to issue its first-mortgage bonds for an amount not to exceed in the aggregate $20,000 per mile of the length of the road and its extensions, and to issue income bonds not to exceed in amount the limit named for the first-mortgage bonds, and to deliver to said J. W. Preston & Co. and others in payment of their respective claims against him $214,906 of said first-mortgage bonds and $107,453 of said income bonds.

The judgments upon which complainants' bill is based were obtained upon bonds delivered by Harper in pursuance of said agreement, the bonds by their terms having become due by reason of the default of the company to pay the interest thereon.

Upon the 2nd of January, 1882, at a special meeting of the stockholders, all being present, the proposition made by Harper to the company as above was unanimously accepted. The only stockholders beside Harper were his codefendants, who, at his instance, subscribed each for one share of stock with the understanding that they were to pay nothing for it, and that they were to become
627 directors and carry into effect Harper's plans and purposes already stated.

Harper widened the guage of the road to standard guage, extended it to the points named in his proposition, and conveyed it to the company, and the company issued and delivered to him the bonds specified, but as the proposition recited that it was based on thirty miles of road, and the total length of the road was but twenty-eight miles, the issue of bonds to him was $560,000 first-mortgage and $560,000 income bonds.

The condition of the road is best stated by Ralph Peters, superintendent of the Little Miami railroad, an experienced and thoroughly competent railroad manager. In August, 1883, his company having been solicited to operate the road, he, with his general manager, passed over and inspected the entire line. He testifies that they "found a very poor road, badly constructed, with heavy grades, only temporary work in the colverts and trestles; the embankments were narrow and the cuts very narrow, the ditching in bad shape. It had been originally built as a narrow-guage road. The guage was widened out, the rails having been spread on the narrow-guage ties, a few standard-guage ties being put in, probably six to each rail, the balance of the ties under each rail being the original ties that were put in when the road was first constructed as a narrow guage." * * * "The rail that was laid on that road was from thirty to
628 forty pounds. It was entirely too light for the traffic of a standard-guage road—that is, for the cars and locomotives of a standard-guage road. They had no water stations, no station buildings that amounted to anything, and seemed to have little or no business." * * * "The trestles all seemed to be in good condition; they had been overhauled by parties who had reconstructed the road, but they were too light for any heavy traffic. The culverts were of timber; many of them had been washed out or had caved in and were only repaired with old ties."

He further testifies that the only things valuable about the road were the rails and material, and that it was worth "as a railroad enterprise or business venture for the purpose of making or earning money to its owners" not more than $2,000 per mile or about the scrap value of the materia- in it, but to anybody "wanting to keep it as a railroad it was worth at least $4,000 per mile."

The $2,000 per mile valuation might properly be re-arded as the correct one, but for the purposes of this case it may be taken at $4,000 per mile or $112,000 the entire road. As a consideration for the transfer of this property to the company, being its entire line of road, Harper actually received $550,000 of the capital stock of the road, $560,000 of its first-mortgage bonds, and $560,000 of its income bonds. It goes without saying that the entire transaction was grossly fraudulent from first to last without a single honest incident or redeeming feature.

The complainants charge that Harper is indebted to the company for the 2,500 shares of the capital stock for which he subscribed and for the 3,000 shares issued to the defendant Lee for his
629 use and benefit, and they pray that this indebtedness may be subjected to the payment of their judgments. In Branch *v.* Jesup, 106 U. S., 468, it was held that a railroad company having authority to purchase a railroad may pay for the same in paid-up stock. "But," says the Supreme Court of the United States in Coit *v.* Gold Amalgamating Company, 119 U. S., 343, "where full- paid stock is issued for property received there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud." There is no doubt that the defendant railroad company had authority to purchase Harper's road, and, this being so, the authorities cited make it clear that the complainants are entitled to the relief sought unless the defenses made by and on behalf of Harper, all the other defendants who have been served with process being in default, are well taken.

Harper's defense is that the contract of October 12th was a contract of compromise and settlement with the complainants fully performed on his part; that the bonds were received by complainants in satisfaction of their claims against him and with the knowledge of the manner in which he had fulfilled his contract with the railway Co., and of the entire history of the transaction; that complainants' judgments were rendered on said bonds, and that the stock issued to Harper was the only stock subscribed for or issued by the railway company.

Pending this suit Harper became insolvent and made a general assignment in favor of his creditors. Thereupon his assignee
630 was, upon his motion, made a defendant and filed an answer setting up that the sole consideration for the claims against Harper upon which said bonds were delivered by him to the complainants was a gaming transaction in the form of a deal in options in wheat at Chicago, in which there was no wheat actually owned or bought or sold, but only a betting on future prices, and that the complainants won from Harper more than $600,000.00, on which

he paid in cash or its equivalent not less than $400,000, and that complainants' claim was for the pretended balance of said winnings. For the amount so paid by Harper the assignee by cross-bill prays for decree and judgment.

Waiving all technical questions made with reference to these pleadings, the short answer to both is that there is absolutely no testimony in the record in support of either the answer or the cross-bill. Harper testifies that the parties claimed, "after absorbing some four hundred thousand dollars in cash of margin on wheat in Chicago," that he owed them a balance of over two hundred thousand dollars, which he disputed, but finally settled and compromised. On cross-examination of Preston he was asked by Harper's counsel whether the consideration claimed to have been received by Harper for the bonds which he agreed to transfer to complainants did not grow out of dealings between Harper and complainants on the Chicago board of trade. To this question complainants' counsel objected and instructed the witness not to answer and he did not answer. He was not pressed, but Harper's counsel stated, as
631 appears by the record, that he proposed to show that the contracting parties had dealings on the Chicago board of trade; that the books of the complainant would not show the amount claimed; "that the entire transaction was disputed and repudiated by Harper as fraudulent;" that the claim was exaggerated, and that it was in settlement of this fictitious claim that he compromised with complainants.

This is all that appears in testimony or that it was proposed to show. Taking altogether, it falls short of what it required to establish that complainants' claims arose from a gambling transaction. Irwin *v.* Willian, 110 U. S., 499.

In support of Harper's defense Coit *vs.* North Carolina Gold Amalgamating Co., 119 U. S., 343, is cited. But in that case the court found that there was no intentional and fraudulent undervaluation of the property in pa-ment for which the stock of the company was issued. Now, the court said that "where the charter authorized the capital stock to be paid in properly and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint." But here neither Harper's contract with the complainants nor his contract with the defendant company was performed honestly or in good faith. From the testimony of Peters, hereinbefore quoted, and from all the circumstances of the transaction it is clear that his pretended performance of his contract to broaden the gauge of the road and extend into the termini named was nothing but a sham and pretense, and his organization of the defendant
632 company "under the laws of Ohio," which, as construed by the supreme court of the State, requires that stock subscriptions be paid in money or its equivalent, was no better. The complainants must be presumed to have relied upon a faithful performance of his contract with them, which was in effect to convert the road into a standard-guage road, and to organize a railroad company which should have an existence in fact as well as in name.

But it is claimed that complainants knew when they entered into the contract with Harper that he was to have all the stock of the company as well as all the bonds as the consideration for the transfer of the road. Harper so testified, but the complainants Preston and McHenry who conducted the negotiations, deny it. There are other witnesses who testify on the subject. The evidence is conflicting. It is true that Harper, in his negotiation for settlement, proposed to complainants to deliver to them a block of the capital stock of the new company, but they declined for the reason which is significant in the bearing on the defense that complainant placed no reliance on the capital stock; that they were not willing to incur the risk of the individual liability which the laws of Ohio imposed upon stockholders. He had before that offered them his entire road in settlement, but after making inquiry as to its condition and value they declined to take it. It was worth no more than the rails would bring for scrap iron—or, in other words, than what Harper paid for it. Put these facts, which are not in dispute, together and they seem to me to solve all doubts that the correct conclusion to
633 be drawn from the testimony is that they understood that the stockholders of the new company were to be subject to the liabilities imposed by the law of Ohio, namely, full payment in money or its equivalent, and, in addition, one hundred per cent. individual liability, and that they did not understand that they were to accept less than four-tenths of the first-mortgage bonds and less than two-tenths of the income bonds of the new company secured by mortgage upon a railroad which they had refused to take entire in settlement, so wretchedly improved as to have at the expiration of eighteen months after its completion an actual value no greater than it had when Harper bought it, to wit, what the iron would sell for as scrap.

This conclusion sweeps away the defence and results in the finding that the complainants are entitled to a decree with costs.

The decree will be against all the defendants except George Clymer, who was not found, and Lewis Seasongood, against whom there is no evidence that he was a stockholder.

I have not referred to the amended bill and the answer thereto (which did not, in my opinion, bring any new issue into the cause), nor to the fact that some of the complainants were not parties to the contract with Harper, but took their bonds by assignment before maturity, because in the view taken of the cause it was not necessary to do so.

634 The decree will also be in favor of the intervening petitioner, Martin Erwin, and Alfred Sully, bondholders. The provision in the bonds that no stockholders shall be individually liable thereon for principal or interest does not exempt stockholders from the subjection of their contractual indebtedness to the company to the payment of its creditors holding judgments obtained upon such bonds, but it does refer to the stockholders' individual liability, which is statutory and not sought to be enforced in this cause.

And afterwards, to wit, on the 24th day of October, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 88.

This cause came on to be heard on the complainants' exceptions and motion to the answer herein of Harlan P. Lloyd, trustee of E. L. Harper, and on the complainants' demurrer to the cross-bill of said Lloyd, trustee as aforesaid, upon consideration whereof the court grants said exceptions and motion and sustains said demurrer; to which action of the court the said Lloyd, trustee as aforesaid, excepts.

And afterwards, to wit, on the 15th day of March, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

635 Compared; O K.

And afterwards, to wit, on the 15th day of March, A. D. 1889, an entry was made upon the journal of said court, clothed in words & figures following, to wit:

Journal Y, p. 251.

Final Decree.

This cause having been heretofore brought to a hearing upon the pleadings herein and also upon the report of Albert S. Lougley, Esq., special examiner to take evidence in the above cause under and in accordance with the 67th rule in equity and to report the same to the court; also upon certain depositions and exhibits and the evidence offered in the case, and also upon the complainants' exceptions and motion to the answer of Harlan P. Lloyd, trustee, etc., and their demurrer to the cross-bill of said Lloyd, and the said cause having been argued by counsel for the complainants and defendants respectively and due deliberation had thereon, the court finds said exceptions and motion well taken and sustains the same, and also sustains said demurrer.

The court also finds all and singular the issues joined between the complainants and the defendants in favor of the complainants, except as to George E. Clymer, who was not found, and Lewis Seasongood, against whom there is no evidence that he was a stockholder of the defendant corporation.

The court further finds, especially, that on December 10th, 1881, at the city of Cincinnati, in the State of Ohio, subscriptions to the capital stock of the defendant The Cincinnati, Columbus and Hocking Valley Railway Company were duly made by the following-named persons, each agreeing to take and pay for stock in said company to the amount and number of shares set against their respective names, to wit:

E. L. Harper, 2,500 shares of the par value of $100 each.
John L. Pfau, 1 share of the par value of $100.
636 E. Snowden, 1 share of the par value of $100.
J. H. Matthews, 1 share of the par value of $100.
W. H. Harper, 1 share of the par value of $100.
D. P. Hyatt, 1 share of the par value of $100.
William C. Herron, 1 share of the par value of $100.
John E. Gimperling, 1 share of the par value of $100.

And the court further finds that on June 1, 1882, at the special instance and request and for the use and benefit of the said defendant, E. L. Harper, said defendant, The Cincinnati, Columbus and Hocking Valley Railway Co., issued to the defendant W. D. Lee its certificates representing three thousand shares of the par value of $100 each of its capital stock; that said Lee is the holder of said certificates; that said certificates represent said Lee as being the owner of said three thousand shares of stock; that said Lee was duly served with process and is in default for answer, and the court proceeds as upon his confession of the matter in the bill stated.

And the court further finds that no part of any of said subscriptions has been in fact paid, nor has anything been paid on account of the three thousand shares of stock so issued as aforesaid to said Lee; that said railway company, defendant, is totally insolvent and has wholly abandoned all action under its charter, its railroad and tangible property having been sold at judicial sale and passed into the hands of others, and that said subscriptions and the liability in respect thereto of said several subscribers and the indebtedness and liability upon and in respect to the issue of said three thousand shares of stock are credits and assets of said The Cincinnati,
637 Columbus and Hocking Valley Railway Company, to which creditors of said company are entitled, as hereinafter decreed.

The court further finds that at the October term, A. D. 1884, of this court, to wit, on the 20th day of November, 1884, Josiah W. Preston and Eugene H. Lahee, two of the complainants herein, recovered a judgment against the defendant The Cincinnati, Columbus and Hocking Valley Railway Company for the sum of $104,477.22, as alleged in the bill herein, together with the costs of said action; that there is now due on said judgment said sum, with interest thereon, at the rate of six per cent. per annum, from the 7th of October, 1884, together with the costs of said action, taxed at $48.37; that on July 30, 1886, it was made to appear to this court that said Josiah W. Preston died after the commencement of this action, and that Emma C. Preston had been duly appointed and qualified as executrix of his last will and testament, and, on motion and by consent, it was ordered by this court that this cause as to said Josiah W. Preston —, had been duly appointed and qualified as executrix, she be substituted herein instead of said Josiah W. Preston and the cause proceed in her favor, and that said Emma C. Preston, executrix as aforesaid, and Eugene H. Lehee are entitled to be paid said sum of money, with interest and costs, as above stated, out of the credits and effects of said railway company.

The court further finds that William E. McHenry, one of the complainants herein, at the October term, A. D. 1884, of this court, to wit, on the 20th day of November of said year, recovered a judgment against the defendant The Cincinnati, Columbus and Hocking Valley Railway Company for the sum of $45,837,21, as alleged in the bill herein, together with the costs of said action; that there is now due on said judgment said sum, with interest thereon,
638 at the rate of six per cent. per annum, from the 7th day of October, 1884, together with the costs of said action, taxed at $42.47, and that the said William E. McHenry is entitled to be paid said sum of money, with interest and costs as above stated, out of the credits and effects of said railway company.

The court further finds that Charles J. Gilbert, William T. Baker, and Murry Nelson, three of the complainants herein, at the October term, A. D. 1884, of this court, to wit, on the 20th day of November of said year, recovered a judgment against the defendant The Cincinnati, Columbus and Hocking Valley Railway Co. for the sum of $98,876.71, as alleged in the bill herein, together with the costs of said action; that there is now due on said judgment said sum, with interest thereon, at the rate of six per cent. per annum, from the 7th day of October, 1884, together with the costs of said action, taxed at $73.32, and that the said Charles J. Gilbert, William T. Baker, and Murry Nelson are entitled to be paid said sum of money, with interest and costs as above stated, out of the credits and effects of said railway company.

The court further finds that Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, four of the complainants herein, at the October term, A. D. 1884, of this court, to wit, on the 20th day of November, 1884, recovered a judgment against the defendant The Cincinnati, Columbus and Hocking Valley Railway Co. for the sum of $6,747.34, as alleged in the bill herein, together with the costs of said action; that there is now due on said judgment said sum, with interest thereon, at the rate of six per cent. per annum, from the 7th day of October, 1884, together with the costs of said action, taxed at $32.22, and that the said Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman
639 are entitled to be paid said sum of money, with interest and costs as above stated, out of the credits and effects of said railway company.

And the court further finds that Alfred Sully, one of the intervening petitioners herein, who filed his petition in this cause on November 4, 1886, is the holder and owner of nine certain negotiable coupon bonds of the defendant The Cincinnati, Columbus and Hocking Valley Railway Co., each payable to the Union Trust Co. of New York or bearer, for the sum of $1,000 in forty years from the date thereof, viz., January 2, 1882, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st days of January and July; that in each of said bonds it was provided that in case of the default in payment of any installment of interest for six months that then the holder thereof might elect to declare the principal of said bond immediately due and payable; that the in-

stallment of interest falling due July the 1, 1884, and the several instalments falling due since then are still unpaid; that there is due and unpaid upon said bonds $11,765.00, including interest, and that said Sully is entitled to a lien for said sum upon the credits herein found in favor of said railway company against Edward L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, and John E. Gimperling, subject, however, to the rights and liens herein found in favor of the complainants.

The court further finds that Martin Erwin, one of the intervening petitioners herein, who filed his petition in this cause on January 24, 1889, is the holder and owner of eleven certain negotiable coupons bonds of the defendant The Cincinnati, Columbus and Hocking Valley Railway Company, each payable to the
640 Union Trust Company of New York or bearer, for the sum of $1,000 in forty years from the date thereof, viz., January 2, 1882, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st days of January and July; and in each of said bonds it was provided that in the case of the default in payment of any instalmen- of interest for six months that then the holder thereof might elect to declare the principal of said bond immediately due and payable; that the instaliment of interest falling due on the 1st day of July, 1883, and the several installments falling due since then are still unpaid; that there is due and unpaid upon said bonds $15,015.00, including interest, and that said Erwin is entitled to a lien for said sum upon the credits herein found in favor of said railway company against Edward L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, and John E. Gimperling, subject, however, to to the rights and liens herein found in favor of the complainants.

The court further finds that the pretended agreement by and between the Cincinnati, Columbus and Hocking Valley Railway Company and its directors and E. L. Harper, whereby said board of directors assumed to release or treat as paid and discharged the liability of said E. L. Harper and said directors, to wit, John L. Pfau, E. Snowden, G. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, and John E. Gimperling, to said defendant railway company on account of their said subscriptions to its capital stock, as referred to and in substance set forth in the bill herein and the amendment th-reto, and the transaction which such pretended agreement was intended to represent was grossly fraudulent in so far and to the extent that it purported to release said parties
641 from their several stock subscriptions and to treat the *the* same as paid and discharged.

The court further finds that the complainants are well entitled in equity to have a decree and execution against the debtors of the defendant The Cincinnati, Columbus and Hocking Valley Railway Company—that is to say, against all and singular the said individual defendants herein excepting George E. Clymer and Louis Seasongood—and therefore the court proceeds to decree to the several parties hereto as to the court seems just and according to equity.

It is therefore ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that the aforesaid pretended agreement by and between the Cincinnati, Columbus and Hocking Valley Railway Company and its directors and E. L. Harper, whereby said board of directors assumed to release or treat as paid and discharged the liability of said E. L. Harper and said directors, to wit, John L. Pfau, E. Snowden, J. E. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, and John E. Gimperling, to said defendant railway company on account of their subscriptions to its capital stock, as set forth herein and in the bill herein and the amendment thereto, be, and the said pretended agreement is hereby, annulled and set aside and declared to be absolutely void and of no effect as against the complainants and intervening petitioners herein and each of them.

And it appearing to the court as hereinbefore found that at the filing of this bill, to wit, on January 5, 1885, the several defendants hereinbelow named were indebted to the Cincinnati, Columbus and Hocking Valley Railway Company in the following-named sums, to wit, E. L. Harper and W. D. Lee, each in the sum of
642 three hundred thousand dollars ($300,000), and John L. Pfau, E. Snowden, J. H. Matthews, W. H. Harper, D. P. Hyatt, William C. Herron, and John E. Gimperling, each in the sum of one hundred dollars ($100), it is therefore ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that the complainants, viz., Emma C. Preston, executrix of the estate of Josiah W. Preston, deceased; Eugene H. Lahee, William E. McHenry, Chas. J. Gilbert, William T. Baker, Murry Nelson, Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman, recover of the defendants as follows: Of E. L. Harper the sum of three hundred and twenty-thousand five hundred and thirty-one dollars and sixty-seven cents ($322,531.67), being the aggregate of their, said complainants', several judgments hereinbefore mentioned, with interest thereon from October 7, 1884, to February 5, 1889, the first day of the present term, and the costs by them expended in obtaining said judgments; of W. D. Lee the sum of three hundred and twenty-two thousand five hundred and thirty-one dollars and sixty-seven cents ($322,531.67), being the aggregate of their, said complainants', several judgments hereinbefore mentioned, with interest thereon from October 7, 1884, to February 5, 1889, the first day of the present term, and the costs by them expended in obtaining said judgments, and of John L. Pfau, E. Snowden, J. H. Matthews, W. H. Harper, D. P. Hyatt, William C. Herron, and John E. Gimperling each the sum of one hundred dollars (100), with interest, at the rate of six per cent. per annu-, on each of said sums from the date of the filing of this bill, to wit, January 5, 1885; and for the making of which several sums as herein decreed, together with the costs of this action, the complainants shall have execution as at
643 law against each of said defendants for the amount so decreed to be due from each.

It is hereby ordered, however, that any and all moneys realized upon the decrees so rendered as aforesaid in favor of the complain-

ants and against the several defendants, after payment of costs, shall be distributed between and paid to the complainants *pro rata*, according to the amounts of their several judgments, with interest and costs as heretofore found, until said decrees, including costs, are satisfied. It is further ordered that of the sums so decreed to be paid to the complainants respectively as against E. L. Harper and W. D. Lee not more than $322,531.67, with interest from Feb. 5, 1889, and the complainants' costs of this action shall be made and collected by the complainants from both said Harper and Lee or either, and that neither said Harper -or said Lee shall be required to pay, by virtue of this decree, a sum in excess of $300,000.00, with interest thereon from the date of the filing of this bill, to wit, January 5, 1885, and the costs of this action, and none of the other defendants above named shall be required to pay, by virtue of this decree, a sum in excess of $100, with interest thereon from the date last aforesaid and the costs herein.

And it further appearing to the court that Edward L. Harper, who is the same person as E. L. Harper aforesaid, did, on the 21st day of June, 1887, make an assignment to Eugene Zimmermann for the benefit of his, said Harper's, creditors, and that said Eugene Zimmermann accepted said assignment and afterwards resigned his trust as assignee, and thereupon the probate court of Hamilton county, in the State of Ohio, in pursuance of the statutes for such cases made and provided, appointed Harlan P. Lloyd
644 trustee of said Harper's property and estate for the benefit of his creditors, and that said Harlan P. Lloyd gave bond and security as required by said court, which was duly approved by said court, and said Lloyd was duly qualified as said trustee and entered upon and now continues in the execution of his duties as such trustee, and is a party defendant in this case and has entered his appearance and filed his answer herein. The court further finding that the several claims of the complainants hereinbefore found, to wit, $131,637.65 in favor of Emma C. Preston, executrix of Josiah W. Preston, deceased, and Eugene H. Lahee, with interest thereon at the rate of 6 % from the 5th of February, 1889; $57,774.38 in favor of William E. McHenry, with interest thereon, at the rate of 6 % per annum, from the 5th day of February, 1889; $124,607.43 in favor of Charles J. Gilbert, William T. Baker, and Murry Nelson, with interest thereon, at the rate of 6 % per annum, from the 5th day of February, 1889; $8,512.19 in favor of Abram Poole, William A. Kent, Selah Young, Jr., and James S. Sherman, with interest thereon, at the rate of 6 % per annum, from the 5th day of February, 1889, are just, and that said complainants are entitled to have their said several claims allowed as against said trustee in the sums aforesaid, and that the said complainants are entitled to have the entire claim of the defendant The Cincinnati, Columbus and Hocking Railway Company against the said Edward L. Harper, to wit, the sum of three hundred thousand dollars ($300,000.00), with interest thereon from January 5, 1885, the date of the filing of this bill, allowed as against said trustee for the purpose of securing to the complainants their full proportion of the value of the credit of the

said railway company against said Harper's estate, and to
645 have the total sum obtainable upon said railway credit distributed between and paid to the complainants *pro rate* in full of the sums payable by said trustee according to the amounts of their several claims hereinbefore allowed as against said trustee, it is therefore ordered, adjudged, and decreed, and this court doth hereby order, adjudge, and decree, that the said defendant, Harlan P. Lloyd, as trustee of the said E. L. Harper, without other or further proof of any claim, either by the complainants or the said defendant railway company, allow the said several claims of the said complainants as above found, and that said trustee also allow the said claim of said railway company against the said Edward L. Harper, and distribute and pay the dividends arising thereon to the said several complainants in the ratio of their said several claims as above found in the settlement of his trusts until said claims of complainants are fully paid if the dividends thereon amount to so much, and that (after the complainants have been paid in full) he pay all subsequent dividends arising thereon to the said intervening petitioners in the ratio of their respective claims as hereinbefore found, and that the said complainants recover from the said E. L. Harper their costs herein expended prior to the appearance of said trustee herein, taxed at $——, and that the said complainants recover from the said trustee their costs herein expended after the appearance of said trustee herein, taxed at $——.

It is further ordered and adjudged that the receipt of any one or more of the complainants' counsel of record herein shall be a good and sufficient voucher to said Harlan P. Lloyd, trustee, for any sum or sums of money that may be or become due to the said complainants or to any of them by virtue of this decree.

The defendants Edward L. Harper and Harlan P. Lloyd,
646 trustee of the estate of Edward L. Harper, except to each and every part of the above findings, order, judgment, and decree and now come and pray an appeal.

Thereupon the court doth grant said appeal as prayed.

And afterwards, to wit, on the 23rd day of April, A. D. 1889, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

JOSIAH W. PRESTON *et al.*
vs.
THE CINCINNATI, COL. — HOCKING VALLEY RAILWAY CO. *et al.*

Know all men by these presents that we, Harlan P. Lloyd, trustee, as principal, and William S. Walker and James A. S. Clark, are held and firmly bound unto Josiah W. Preston and others in the

sum of one thousand dollars, to be paid to the said Josiah W. Preston and others, his executors or administrators; to which pay-
647 ment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 22nd day of April, 1889.

Whereas the above-named Harlan P. Lloyd, trustee, has taken out an appeal to the Supreme Court of the United States of America to reverse the decrees rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named Harlan P. Lloyd, trustee, shall prosecute his said appeal to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

HARLAN P. LLOYD,
Trustee Estate of E. L. Harper. [SEAL.]
WILLIAM S. WALKER. [SEAL.]
JAMES A. S. CLARK. [SEAL.]

Sealed and delivered in presence of—
B. E. DILLEY.
ROB'T C. GEORGI.

The above security is approved.

GEO. R. SAGE,
District Judge of the U. S., S. D. O.

648 SOUTHERN DISTRICT OF OHIO, *ss:*

I, William S. Walker, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth one thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

WILLIAM S. WALKER.

Sworn to before me the 23rd day of April, 1889.

ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, [SEAL.]
Southern Dist. of Ohio.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, James A. S. Clark, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth one thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

JAMES A. S. CLARK.

Sworn to before me the 23rd day of April, 1889.

ROB'T C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

649 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true, and complete transcript of the proceedings had in the above-entitled cause in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 25th day of June, A. D. 1889.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk.*
B. E. DILLEY, *Deputy.*

650 THE UNITED STATES OF AMERICA, *ss:*

To Emma C. Preston, executrix of Josiah W. Preston, deceased; Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, William T. Baker, Murry Nelson, Abram Poole, Elmore A. Kent, Selah Young, Jr., and James S. Sherman and Alfred Sully and Martin Erwin, Greeting:

Whereas Edward L. Harper and Harlan P. Lloyd, trustee, have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, made in favor of you, the said Emma C. Preston, executrix, *et al.*, and has filed the security required by law: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Cincinnati, in the sixth circuit, this 4th day of March, in the year of our Lord one thousand eight hundred and ninety.

GEO. R. SAGE,
District Judge of the United States within and for the Southern Dist. of Ohio, Sitting and Holding Circuit, there Being no Associate Justice or Circuit Judge in the District.

651 [Endorsed:] 1181. United States circuit court, S. D. O., W. D. No. 3718. J. W. Preston *et al. vs.* The C., C. & *W.* V. R'y Co. *et al.* Citation to appellee. Office Supreme Court U. S. Filed Mar. 12, 1890. James H. McKenney, clerk. H. P. Lloyd, counsel for appellants.

Service of a copy of this citation is hereby acknowledged this 6th day of March, 1890.

BOYCE & BOYD,
Of Counsel for Appellees.
PAXTON & WARRINGTON,
Of Counsel for Appellees.
OTTO GRESHAM,
Of Counsel for Appellees.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 1181. Harlan P. Lloyd, trustee, app't, *vs.* Emma C. Preston, adm'x, &c. Citation & proof of service. Filed Mar. 14, 1890.

Endorsed on cover: Case No. 13,588. S. Ohio C. C. U. S. No. 59. Harlan P. Lloyd, trustee of Edward L. Harper, *et al.*, appellants, *vs.* Emma C. Preston, executrix of Josiah W. Preston, deceased, *et al.* Filed July 24, 1889.

146-69

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 59.

Harlan P. Lloyd, Trustee of Edward L. Harper, et al., *Appellants,*

vs.

Emma C. Preston, Executrix of Josiah W. Preston, Deceased, et al., *Appellees.*

BRIEF FOR APPELLANTS.

H. P. LLOYD,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 59.

Harlan P. Lloyd, Trustee of Edward L. Harper, et al., *Appellants,*

vs.

Emma C. Preston, Executrix of Josiah W. Preston, Deceased, et al., *Appellees.*

STATEMENT OF THE CASE.

This action was commenced by a bill in equity, filed in the Circuit Court for the Southern District of Ohio, by *Josiah W. Preston et al.* v. *Edward L. Harper et al.*, alleging that, in a previous action in this court, the complainants had recovered judgments against the Cincinnati, Columbus and Hocking Valley Railway Company, one of the defendants in this action, and that writs of execution had been issued and returned unsatisfied. In that previous action, the only defendants were the Cincinnati, Columbus and Hocking Valley Railway Company and its lessee, the Indiana, Bloomington and Western Railway. Edward L. Harper was not named as a defendant, was not served with process, and had no opportunity to defend.

Complainants seek to recover in this case a decree against the individual defendants, on the ground that they had been subscribers to the capital stock of their co-defendant, the railway company, and had failed to pay their stock subscriptions. There is a further averment that the railway company had become insolvent, and that it had abandoned all action under its charter, and that nothing could be accomplished in the matter of enforcing collection of subscriptions from said company or its officers.

The bill was filed on the 5th day of January, 1885; and, in due time, an answer was filed, admitting that Harper had subscribed the amount of 2,500 shares, and the other individual defendants one share each.

The answer further sets forth that the defendant, Edward L. Harper, in October, 1881, was the owner of a narrow gauge railroad, and that Preston & McHenry made some claim against said Harper which he disputed; that a contract was made between the complainants and said Harper, by which they agreed, in writing, October 12, 1881, that, within four months, said Harper should cause the gauge of his said railroad to be changed to a standard gauge, and that it should be extended certain distances at each end, and that he would cause a new corporation to be organized under the laws of Ohio, to be named The Cincinnati, Columbus and Hocking Valley Railway Company. This railway corporation was to issue its coupon bonds, secured by a first mortgage on the road, its extensions and franchises; also, certain income bonds, secured in the same manner. A nominal capital was to be fixed in the charter. (See p. 18 of the Record; also, pp. 207 and 208 of the Record.)

The answer further sets forth that Harper agreed to deliver to the complainants certain bonds, which they were

to accept in full settlement and compromise of their asserted claims against him; that Harper fully performed his said agreement, and immediately took the necessary steps for the organization of said corporation; that the corporation was organized under the laws of Ohio; that bonds to the amount of $20,000 per mile were issued; that Harper changed the gauge of the road, and made it a standard gauge, as agreed; and that he extended the railroad, as provided for in the said contract with Preston and others.

The answer further avers that Harper received from the railway company, in accordance with his formal proposition to that effect, and duly accepted the bonds of the said railway company, and that he delivered to Preston & McHenry the full amount of bonds, as per his contract, and took from Preston & McHenry a receipt in full satisfaction of all debts and obligations whatever, which said receipt is found on page 209 of the Record, folio 517.

The answer further avers that Preston & McHenry accepted these bonds with full knowledge of the entire history of the transaction, and with full knowledge of the manner in which Harper had fulfilled his said contract, and with full knowledge of the condition of the railway.

The answer also avers that the judgments set out in the bill were rendered on the identical bonds issued to said Preston and others pursuant to said agreement, and that there was no other stock owned or held by any person, nor had any other stock ever been subscribed, held, or owned, except the stock which was paid for by said Harper by the transfer of said railway and property in pursuance of the agreement shown as "Exhibit A," on page 207 of the Record.

No liability on the part of Harper to the complainants is admitted in any manner or form.

The original bill was filed on the 5th of January, 1885; the answer was filed on the 25th day of March, 1885. After the testimony had been fully taken, and was on file in the clerk's office, the complainants, on the 26th day of May, 1887, filed a motion for leave to withdraw their replication and to amend their bill of complaint. On the 31st day of May, 1887, leave was granted complainants to file an amended bill within ten days from date, and defendants were allowed thirty days additional in which to answer or demur. On the 7th day June, 1887, the amended bill was filed (see Record, p 247); and on the 7th day of July, 1887, the answer of E. L. Harper to the amended bill was filed (see p. 250 of the Record).

In this answer of Harper to the amended bill it is alleged that the object of the organization of the railway company, and all that was done in connection therewith, was well known to the complainants, and that they knew there was no money to be paid on any subscription to the capital stock of the company, that Preston & McHenry and others consented to this arrangement beforehand, and that nothing was done in fraud of the rights of said Preston and others.

There is a further allegation that said Preston and others had full knowledge of the value of said road and the securities covered by said mortgage; that Preston and others had full knowledge of the contract that was made between Harper and the railway company; that this contract was made in pursuance of the wishes and understanding of said Preston and others; that it was done for the purpose and for the consideration expressed in the

agreement signed by Preston and others; and denies that there was any fraudulent purpose in it.

On the 28th of March, 1888, a supplemental bill was filed by the complainants, and in this Emma C. Preston appears as executrix of the estate of J. W. Preston, deceased. This supplemental bill alleges that since the filing of the original bill and the amendment thereto, E. L. Harper had become insolvent, and had made an assignment for the benefit of his creditors, under the insolvent laws of the State of Ohio, and that Harlan P. Lloyd had been duly appointed and qualified as the sole trustee of all the property so conveyed and transferred. Complainants therefore prayed that said Lloyd, trustee, should be made a party defendant and be required to answer the premises and show cause.

On the same day Harlan P. Lloyd, trustee of the estate of E. L. Harper, filed an answer and cross-bill to the original bill, the amended bill, and the supplemental bill, and the intervening bills filed by other claimants.

After the formal averments, Lloyd, trustee, denied the validity of the claim of the complainants and of all other parties against E. L. Harper or himself as trustee, and alleged that the only consideration on which complainants' claims were founded was a gaming transaction in the form of a deal in options in wheat in the Chicago market, in which gambling transaction by betting on the future price of wheat in Chicago complainants claim to have won from Harper between the 1st day of January, 1881, and the 1st day of October, 1881, very large sums of money, amounting in the aggregate to more than $600,000, of which said E. L. Harper had actually paid in cash or its equivalent at least $400,000, and that the claims of the complainant for $214,000, asserted in their bill, was for a pretended balance

of said winnings at gaming by the complainants in said betting transactions in the Chicago markets, and for which pretended balance said Harper gave to said complainants certain bonds of the Cincinnati, Columbus and Hocking Valley Railway Company, referred to in the bill, on which bonds the judgments in favor of the complainants were founded, and on no other consideration whatever.

The trustee further alleged that, by the laws of the State of Illinois, where the gambling occurred, as well as by the laws of the State of Ohio, where the remedy was sought, the said betting contracts and gambling transactions were totally void, and that the loser, who has paid money on account of such losses, was entitled to recover the same, and by way of cross-bill the trustee asked for affirmative relief to the amount of $400,000. (See Record, pp. 254 and 255.)

To this answer of Lloyd, trustee, exceptions were filed (see Record, p. 256); also, a motion to strike out a portion of the answer was filed (see Record, p. 257), and to the cross-bill a demurrer was filed (see Record, p. 258.)

Before deciding the motion or the demurrer, or passing upon the exceptions, the learned judge to whom the case was submitted filed in the office of the clerk of the Circuit Court, on the 28th of August, 1888, his written opinion, deciding the entire case, thus refusing all opportunity for the trustee to take testimony in support of the allegations of his answer and cross-bill.

On the 24th day of October, 1888, an entry was made upon the journal of the court as follows:

"Journal Y, p. 88. This cause came on to be heard on the complainants' exception and motion to the answer herein of Harlan P. Lloyd, trustee of E. L. Harper, and on the complainants' demurrer to the cross-bill of said Lloyd, trustee, as aforesaid.

"Upon consideration whereof, the court grants said exceptions and motion and sustains said demurrer."

"To which action of the court the said Lloyd, trustee as aforesaid, excepts." (See Record, p. 264.)

The trustee had made oral application for leave to take testimony to sustain the allegations of his answer. But before the decision was rendered upon the exceptions to the answer, the learned judge had decided the whole case.

Harper's deed of assignment was dated June 21, 1887. This was long after all the testimony in the case had been taken. The trustee was not named in the original deed of assignment, but was appointed by the court some time after the deed was filed. He was not a party to this case until March 20, 1888, when he was made such by the filing of the supplemental bill, and until that period the trustee had no opportunity whatever to make a defense.

On the 15th day of March, 1889, the final decree was entered. (See the Record, pp. 264 to 270, inclusive.)

This decree provided that the complainants should recover of E. L. Harper the sum of $322,531.67, being the aggregate of the complainants' several judgments, with interest thereon from October 7, 1884, to February 5, 1889, the first day of the term of the court, and costs. Judgment for the same amount was entered against one W. D. Lee, who had never been a subscriber to the capital stock at any time, and who had never had any of the stock issued to him at any time.

In addition to this the court found:

"That the said complainants are entitled to have the entire claim of the Cincinnati, Columbus and Hocking Valley Railway Company against the said Edward L. Harper, to wit, the sum of $300,000, with interest thereon from

January 5, 1885, the date of the filing of the bill, allowed as against said Lloyd, trustee, for the purpose of securing to the complainants their full proportion of the value of the credit of the said railway company against said Harper's estate, and to have the total sum obtainable upon said railway credit distributed between and paid to the complainants *pro rata*." (See the Record, p. 286, folio, 642; Record, p. 269, folio 644.)

It thus appears, first, that on a stock subscription of $250,000, judgment is rendered against E. L. Harper for the sum of $322,531.67.

It further appears, that this judgment against Harper is allowed against the trustee, without giving the trustee any opportunity to defend.

More startling still, is the further provision, allowing $300,000 additional and interest against the trustee, on a claim which had never been proven against Harper, the assignor, and which never could have been proven against him in a direct proceeding for that purpose. There had been given no opportunity to contest this claim.

The defendants, E. L. Harper and H. P. Lloyd, trustee, excepted to each and every part of the findings, order, judgment, and decree of the Circuit Court, and prayed an appeal, which was granted as prayed.

The case is now in this court upon the appeal.

ERRORS IN THE DECREE.

1. There was error in the decree of the court below in holding Harper liable to a stock subscription, which had been already fully paid to the corporation by a transfer of the railway property and franchises.

2. There was error in the decree in holding Harper liable on such subscription, at the suit of Preston & McHenry, bondholders, who were privy to the contract and

cognizant of the whole proceeding by which the corporation was organized, whose bonds these complainants seek to enforce.

3. There was error in the decree in allowing other persons, bondholders and privies in estate with Preston & McHenry, to hold Harper liable on such stock subscription.

4. The court below erred in sustaining the exceptions to the answer filed by Lloyd, trustee.

5. The court below erred in granting the motion to strike out certain parts of the answer of Lloyd, trustee.

6. The court below erred in sustaining the demurrer to the cross-bill of Lloyd, trustee.

7. There was error in the decree in allowing any claim to the complainants for any sum greater than $250,000 and interest.

8. There was error in the decree in allowing interest upon any part of the claim, after June 21, 1887, the date of Harper's assignment.

STATEMENT OF THE EVIDENCE.

1. The complainants did not introduce any evidence in support of their claim, the judgment against the railway company, recovered in a previous action in the same court. The decree in that case is therefore printed as an appendix to this brief for the information of the court. The complainants did introduce the subscription book of the defendant railway company, which shows a subscription by E. L. Harper for 2,500 shares of the capital stock, and no more, at the price of $100 per share. (See Record, p. 211.)

The minutes of the meetings for the organization and

operation of the company are set forth in the Record, pp. 209 to 219 inclusive.

It thus appears in testimony that all the provisions relating to the incorporation under the laws of Ohio were complied with, and that the bonds of the road were issued by authority of the board of directors, and were valid for the purpose indicated. These bonds were issued in accordance with the terms of the agreement shown on p. 207 of the Record, and were delivered in accordance therewith, as appears by the receipt on p. 209.

There is no testimony to show that the stock of the company was ever issued to anybody; no certificates were ever signed or delivered to Harper. See testimony of E. L. Harper, p. 140.

The testimony shows that after the proposition was made by Harper for the widening of the gauge of the railway and for the issue of the bonds as proposed in the contract, J. W. Preston and W. E. McHenry, before signing the contract, asked for time sufficient to enable them to go in person and examine the road-bed and general condition of the property. Time was given for this purpose; they went and personally examined it, and came back and signed the contract on the 12th of October, 1881. (See the testimony of A. P. Gahr, Record, pp. 94 and 95; p. 98, folio 203; p. 106, folio 219; p. 107 and p. 109, folio 224. See also testimony of W. H. Harper, p. 132, folios 271 and 272.)

Mr. Preston also testifies that he went and examined the road in February, 1882, after a part of the work had been done to widen the gauge of the railway and to extend its termini, and before the bonds were delivered to him and accepted by him. He also testified that McHenry went up to see the railway prior to the time when the

gauge was changed. He also testifies that Lahee, Preston's partner, went over the road once, and Preston's impression was that this examination was made before the gauge was changed. (See Record, pp. 42, 43, folios 92, 93, and 94.)

During the period which elapsed from the date of the contract, October 12, 1881, to the actual delivery of the bonds to Preston & McHenry, February 11, 1882, Preston & McHenry came to Harper's office frequently, and kept themselves fully advised of all that was being done to carry out the conditions of the contract. (See the Record, p. 95.)

The testimony of E. L. Harper shows that he took prompt measures to perform all the conditions of the contract on his part, and the record evidence of the charter of the new railway company, and of the proceedings of the board of directors, and the actual broadening of the gauge, corroborate Mr. Harper's testimony in this respect.

To carry out this contract in good faith Harper expended large sums of money, and the stubs of his checkbooks are introduced, with various copies of drafts, showing payments.

2. On another branch of the case, the testimony of J. W. Preston, on page 46 of the record, shows that he was, and had been for a year or two previous to the 12th day of October, 1881, engaged in the general commission business in the city of Chicago, buying and selling grain and provisions on the Chicago Board of Trade; and that the other complainants associated with Preston in this case were also wheat brokers on the Chicago Board of Trade. (See Record, p. 47.)

The same wituess was asked whether the considera-

tion for which the railway bonds were delivered by Harper to Preston, did not grow out of dealings between Harper and Preston & McHenry on the Chicago Board of Trade. Counsel for the complainant instructed his client and witness not to answer the question, and the master, before whom the testimony was taken, did not enforce an answer. But the offer was made at the time by the defendant's counsel to show by the witness, Preston, that the books of Preston & McHenry, kept in Chicago, would not show the amount of wheat deals which Preston & McHenry claimed in October, 1881, and for which they presented accounts against Harper.

Defendant's counsel further offered to show that the entire transaction with Preston & McHenry was repudiated by Harper as fraudulent, when presented; that Harper had been fraudulently dealt with; that the claim was exaggerated; and that it was in settlement of this fictitious claim that the agreement was made by which this road was to be extended and widened, and the Chicago brokers were to take the bonds in settlement of the disputed claim. (See the Record, pp. 47 and 48.)

All the bonds represented by all the various complainants in this case were issued to Preston & McHenry in settlement of the wheat deals in Chicago, and a portion of the bonds were transferred to different parties in payment or part payment of an indebtedness to them, resulting from the failure of Preston & McHenry on the 1st of October, 1881. (See Record, pp. 48 and 52.)

The testimony of E. L. Harper, on page 67 of the Record, shows that Preston & McHenry came to him, after absorbing some $400,000 in cash of Harper's money on margins for wheat in Chicago, and claimed that Harper should pay an additional amount of more than two hun-

dred thousand dollars on the same wheat deal—which Harper refused to pay, but finally agreed to the contract of October 12th. This evidence shows a gambling transaction, though the witness naturally shrank from using the actual words.

The testimony of J. W. Wilshire, on page 145, corroborates the testimony of Harper as to this gambling transaction in wheat.

The amounts paid by Harper for margins on fictitious sales were as high as $50,000 a day, paid by Harper to the Chicago brokers in actual currency. (See Harper's testimony on page 162 of the Record.)

Howard Eckert was one of the brokers in these gambling transactions. His testimony appears on pages 176, 177 and 178 of the Record, and he distinctly states that in these wheat deals no grain or produce was kept on hand; that the brokers only kept an office, and did not anywhere keep the articles which were pretended to be bought and sold. There was no actual commodity; the whole thing was fictitious, to be settled by "differences," and was a gambling transaction. (See, particularly, Eckert's testimony on page 178.)

The allegation in the answer of Lloyd, trustee, as to the gambling transaction is supported by the testimony of Eckert, just referred to, and is corroborated by the testimony of John L. Pfau, found on page 111 of the Record.

Five witnesses, well informed as to the facts, thus testify to the nature and somewhat to the extent of the gambling transactions set forth in the allegations of the answer of Lloyd, trustee. Three of these witnesses were the brokers, who were actually conducting the so-called

wheat deals; one was an outsider, who heard portions of the conversations between the brokers and Harper; the fifth is the victim who had been fleeced and swindled.

ARGUMENT.

First. The first question for discussion upon the foregoing statement of the case and of the evidence is, whether Harper could properly be held liable to a bondholder upon a stock subscription to the railway company, made in pursuance of the agreement of October 12th, 1881.

1. We must consider the situation of the parties at the time when Preston made his demand upon Harper for a settlement of the alleged balance claimed to be due upon the wheat deal, over and above the margins deposited.

Leaving in abeyance for the moment, the question of the illegality of the transaction upon which this claim was based, it was, at the very best, a disputed claim, one not recognized by Harper, and one which he was unwilling to pay. Considerable conversation ensued, and at last a compromise was agreed upon, which is set forth in the contract shown as "Exhibit A," on the Record. All of the contemplated proceedings for the organization of the railway company, and for the widening of the guage and betterment of conditions, had been fully discussed between Preston and Harper, and were as well understood by Preston & McHenry as by Harper himself. Moreover, they were familiar with the steps taken from time to time in carrying out the contract; all these proceedings and all the steps taken were approved by Preston & McHenry. They were in a position to know all that was being done. They had no ground for complaint that any deceit or fraud

was practiced upon them. They were getting in settlement of a disputed claim a large amount of bonds which may have had little value at the time of the organization of the company, but which might become very valuable with a railway, having through connections, and doing a prosperous business. Be that as it may, Preston & McHenry represented an unliquidated demand which they knew could not have been enforced against Harper in any court of the country, when the nature of the consideration was shown. They had a worthless claim which they settled in exchange for bonds, which ultimately proved to be worthless, but which might have become valuable. There was no fraud in this. Preston & McHenry lost nothing. They gave up no enforceable right, and were, at no time, in any worse position after the transaction than before. There is nothing in their situation which appeals to the sympathy of the court, and they must stand on their legal rights with no presumptions in their favor.

2. The only object of the organization of the defendant railway company was to carry out this scheme in favor of Preston & McHenry. A formal stock subscription of a portion of the capital stock of the company was necessary in order to comply with the provisions of the Ohio statute law. This was done, but it was done with the distinct understanding and agreement that Harper's stock subscription was to be paid by the expenditure of the money necessary to widen and improve the road-bed, and then by conveying and delivering the entire railway property, thus improved, to the railway company. This was the consideration agreed upon beforehand, and accepted by all of the parties who had any rights in the premises.

a. It was accepted, in the first place, by the directors, and their action was ratified by the unanimous vote of all

the stockholders of the company. There is, therefore, no one representing the company or any share of stock who has any right to complain of the inadequacy of the consideration, because no one of them parted with any money, property, or rights upon the faith or credit of Harper's stock subscription, and no one of them was injured in any respect by accepting the transfer of Harper's railway property in payment of his stock subscription.

b. In the second place, there was no existing creditor of the company who was injured thereby.

c. In the third place, there was no subsequent creditor of the company who was injured by this action of the board of directors of the railway company. Preston & McHenry and their privies were the only subsequent creditors of the company who have spoken. But they are estopped by the fact that they were parties to the contract of October 12, 1881. They are estopped by the fact that this railway company was organized, and the whole formality of a stock subscription, and the payment thereof, was gone through, and the entire transaction performed at their instance and request, and for their use and benefit. If anybody was to be benefited by this arrangement, it was not Harper, for he was parting with property which was entirely his own, obtaining therefor only the release of a claim which could not have been successfully asserted against him. The only parties who could reap a possible benefit therefrom were Preston & McHenry and their privies. They are not in a position to complain.

3. The contract, signed by the parties and dated October 12, 1881, was either valid or invalid.

a. If this contract was invalid, the railway bonds issued in pursuance of the agreement had no legal consideration, and were also invalid. A judgment rendered

upon them in a proceeding for foreclosure of a mortgage could have no force beyond the sale of the railway property securing the payment of the bonds. A judgment over for an alleged balance due would be invalid, and in that case the complainants would have no standing in a court of equity.

b. The complainants were, therefore, logically compelled to admit the validity of the contract of October 12, 1881; hence, they were also compelled to admit the receipt of the bonds delivered to them in pursuance of the agreement. Hence, also, it follows from the testimony heretofore recited tending to show the entire fulfillment of the contract on Harper's part, and from the testimony heretofore recited tending to show that Harper's stock subscription was fully paid by the delivery of the railway property to the railway company, that these complainants had no right to maintain an action in equity for the enforcement of the stock subscription.

Colt v. *Amalgamating Co.*, 119 U. S. 343.

c. If the defendant corporation had brought an action at law against Harper, in the usual form, to enforce the payment of the subscription alleged to be unpaid, Harper could have successfully defended this action by the introduction of the testimony adduced in the case at bar, and heretofore recited in this brief.

d. There is no testimony tending to show that these complainants ever called upon the corporation to prosecute such an action, or that the corporation refused such request. It must, therefore, be taken for granted that no such request was ever made. This being so, the present complainants, who are simply creditors holding a judgment against a railway corporation, are only seeking, by invoking the jurisdiction of the Chancery Court, to ac-

complish that which the corporation itself could not have done in an action at law.

e. While equity would perhaps interfere to give relief to a judgment creditor, by an action in the nature of a creditor's bill, yet such relief will not be granted in equity except upon a claim which was enforceable against a subscriber to the stock.

This action, in its present form, was therefore not properly maintainable against Harper on the testimony adduced at the hearing.

f. The only method by which the learned judge in the court below could arrive at a conclusion different from this, was by introducing the element of fraud, and by a forced construction making Harper the only person guilty of a fraud. To do this, however, he entirely overlooked the fact of the illegality of the consideration plainly shown in the testimony as heretofore pointed out; and, also, ignored that portion of the testimony on the part of Preston, himself, and of five other witnesses, tending to prove that Preston & McHenry understood this whole transaction, whether fraudulent or otherwise, and that Preston & McHenry were as deep in the mud as Harper was in the mire. The ancient and fundamental maxim may well be quoted here: "They who come into a court of equity seeking equity must come with clean hands."

Preston & McHenry, by their own confession, come with unclean hands; partners in an unconscionable fraud of which Harper was the victim, so far as the Chicago wheat-deal was concerned. And if there was any fraud in the organization of the defendant railway company, and in the issuance of its bonds, Preston & McHenry were each *particeps criminis*, and fully cognizant of all the contem-

plated wrong to be done to an innocent public, a public of which they formed no part.

Preston examined the road individually while the change of gauge was being made, and knew exactly what was being done in pursuance of the contract. His eagerness to get possession of some paper bonds was very great, and he had no sooner received them than he ran around with the greatest haste and palmed them off upon his own long suffering creditors, sharers in his Chicago deals, and victims of his duplicity or misfortune, as the case may have been.

SECOND.

I. Coming now to the second branch of the case, the record shows that, before the case was brought to trial in the court below, the defendant Harper became insolvent and made a general assignment for the benefit of his creditors, and that Lloyd, trustee, represents the creditors in the pending action. In the discharge of his duty, Lloyd was bound to defend his trust. He had no alternative. He examined the case and found that no judgment had been rendered against Harper in the previous action in the Circuit Court for the foreclosure of the bonds and the sale of the mortgaged property. Harper had not been even named as a party in that proceeding, had no opportunity to defend, and had had no day in court. He was therefore at liberty in the case at bar to have pleaded the illegality of the consideration in the contract of October 12, 1881, and the illegality of the consideration for the bonds issued to Preston & McHenry; for the whole transaction was one, and the fraud of the gambling transactions in Chicago wheat, tainted the entire matter from the beginning to the

end. Touch it where we will, that glaring fraud on the part of Preston & McHenry stares us in the face.

But our opponents seek, on three grounds, to prevent the trustee from setting up these gambling transactions as a defense in the case.

1st. That Harper did not set this up in his original answer below.

2d. That the question became *res adjudicata* by the decree of foreclosure in the prior suit upon the mortgage.

3d. That the trustee stands in Harper's shoes and can make no defense which Harper could not have made.

Let us examine these points in their order:

1*st*. At the time that Harper filed his original answer he was supposed to be in solvent circumstances, and was carrying on a large business. He had ample means, and was handling large sums of money. There may have been business considerations sufficient to control his mind and prevent his setting up the nature of this gambling debt. Whatever the reason, these considerations were such that he did not set them up. But he had an undoubted right to have availed himself of this defense at any proper stage in the proceedings in this case in the court below, and the fact that he did not do so, does not bar the trustee from the exercise of his undoubted right to do the same thing.

2*d*. In the second place, it must be constantly borne in mind that Harper was not a party to the foreclosure case in which the decree was rendered against the defendant railway company. He was not called upon in that case to make any issue as to the illegal consideration, and made none. The decree in that case was binding only upon the parties to that action, and was *res adjudicata*

See appendix p. 41

only as to the matter which was directly in issue in that action. Its scope could not be enlarged by bringing a new action upon it, and its binding power can not extend to any one not a party.

To make a matter *res adjudicata* there must be a concurrence of the four conditions following, namely: 1st. Identity in the thing sued for; 2d, Identity of the cause of action; 3d, Identity of persons and of parties to the action; 4th. Identity of the quality in the persons for or against whom the claim is made.

Atchison, etc. R. R. v. *Commissioners*, 12 Kan. 127.

The mere fact that matters might have been introduced in a former suit does not make them *res adjudicata*, they not being involved in the record.

Hubbard v. *Flynt*, 58 Miss. 266.
Porter v. *Wagner*, 36 Ohio St. 471.

To establish a defense of *res adjudicata*, the record must show affirmatively that the plaintiff's relation to the former action was such as to make the judgment therein conclusive of the matter in controversy.

Hartley v. *Gregory*, 9 Neb. 279.

When the two principal parties and the thing demanded in two suits are different, the judgment in one can not be pleaded as *res adjudicata* in the other suit.

White v. *Gaines*, 29 La. Ann. 769.

A judgment is *res adjudicata* only as to the questions passed on therein, and as to those who were parties thereto.

Carrol v. *Hamilton*, 30 La. Ann., Part I, 520.
Ledoux v. *Burton*, Id. 276.
Barkdall v. *Herwig*, Id. 618.
Logan v. *Herbert*, Id. 727.

A judgment in favor of one or more joint contractors is no bar to a suit against another of the joint contractors, who neither voluntarily appeared nor was served with process in the first action, and who was not within the jurisdiction of the court trying the case.

Larison v. *Hager*, 44 Fed. R. 49.

A judgment in an action between the same parties, though relating to the same subject-matter, is not *res adjudicata* when the cause of action is not the same.

Linne v. *Stout*, 44 Minn. 110.

A judgment in an action ostensibly for the interest on its bonds, but in fact prosecuted and defended by a town for the purpose of having them declared invalid, is no bar to a re-examination of the entire question in a subsequent action for their cancellation against bondholders not parties to the former action.

Calhoun v. *Delhi & M. R. Co.* (N. Y.) 24 Northeastern Rep. 27.

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

Packet Co. v. *Sickles*, 5 Wall. 592.

See also, *Russell* v. *Place*, 94 U. S. 606.

Woodland v. *Newhall*, 31 Fed. Rep. 434.

One not a party or privy to a judgment may attack it collaterally where it appears to affect his rights.

Safford v. *Weare*, 142 Mass. 231.

A former judgment is conclusive only as to facts in issue not as to collateral facts, although in evidence.

Voge v. *Breed*, 14 Ill. App. 628.

The record must show that the precise point was decided.

Althorp v. *Beckwith*, 14 Ill. App. 628.

A judgment to operate as an estoppel, must be between the same parties, and must directly rest on the precise issues and matters in difference in the second action.

Temple v. *Williams*, 91 N. C. 82.

Williams v. *Clouse*, Id. 322.

In order that a judgment in a former action should bind parties and privies, by way of estoppel, in a subsequent action it must have directly decided a point which was material in such former action, and is in litigation in the latter.

Dixon v. *Merritt*, 21 Minn. 196.

"On principle, a point not in litigation in one action can not be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action. Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, *and his own situation at the time.* A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Cromwell v. *County of Sac*, 94 U. S. 356.

"The judgment rendered in a cause must be held to the issues made by the pleadings, and the estoppel will operate only as to the issue, and whatever was necessarily involved in that issue. Presumption will never be indulged in favor of an estoppel beyond what is necessary to sustain the judgment rendered. *Russell* v. *Place*, 94 U. S. 606; Bigelow, Estop., pp. 152–155; *Barnes* v. *Railroad Co.*, 122 U. S. 14; Black, Judgm., sec. 242."

Gilmer v. *Morris*, 46 Fed. Rep. 333, 335.

Authorities upon this point could be multiplied indefinitely, but a slight examination will show the Court that the issue presented in the answer of Lloyd, trustee, had never been passed upon by the Court in the former case;

and, from the very nature of the action, could not have been. See however authorities discussed in—

28 Central Law Journal, 90, Note.
1 Lawyer's Reporter, annotated, 572, Note.

In a recent case in the United States Circuit Court for the District of Colorado, it was held, in an able opinion by Judge Hallett, that:

"A judgment against a county is not conclusive as to the legality of the debt on which it was rendered where it does not appear that the question of the legality of the debt was put in issue by the pleadings."

Wilder v. *Board of County Commissioners*, 41 Fed. Rep. 512.

We must not be misled by the attempt of the plaintiffs below to plead an estoppel in this case:

"An estoppel is to be resorted to solely as a means to prevent injustice, always as a shield, but never as a sword."

Pierepont v. *Barnhard*, 5 Barbour, 364.

An estoppel *in pais* can only be set up as a means to prevent injustice.

Thomas v. *Bowman*, 29 Ill. 426.

An estoppel can never be allowed where it would itself perpetrate a fraud, work injustice, or fail to protect the innocent.

Mills v. *Graves*, 38 Ill. 455.

It is true that it was held in a case arising in Kentucky that the recital of a consideration in a mortgage estopped the mortgagor, or his representative, from alleging that it was made without consideration. But even in that case, it was held that he could show that the consideration was illegal.

Norris v. *Norris*, 9 Dana (Ky.), 317.
Jones v. *Jones*, 20 Iowa, 388.

We may remark further, that the doctrine of estoppel can never apply to make good an act which was forbidden by the statute. In this case the statute of Illinois, where the complainants resided, and where the wheat-deal was carried on, expressly forbade gambling of this character; and this gambling debt was the only consideration for the transfer and delivery of the bonds by Harper to Preston & McHenry.

New York R. R. Co. v. *Schuyler*, 38 Barbour, 534.

If this did not apply in full force in favor of Harper himself, it would still be good in favor of Lloyd, trustee.

An estoppel *in pais* against distributees is no defense to an action by the administrator.

Cox v. *McKinney*, 32 Ala. 461.

3d. Again, even if Harper could not have set up this failure of consideration, and the nature of the transaction as a gambling debt, on the ground that he could not take advantage of his own wrong, this objection does not lie against Lloyd, trustee, who came into court and stands there as the representative of the creditors of Harper. The books abound with cases showing how constantly courts, both of law and of equity, allow a trustee, an assignee or an executor, to avail himself of defenses not allowed to the assignor or the decedent.

"The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts, to the injury of his creditors, by means of fraud."

Clements v. *Moore*, 6 Wall. 299.

A party may resist, by way of answer, a bill brought to carry a decree into effect, by showing fraud in obtaining it.

Carneal v. *Wilson*, 3 Litt. (Ky.) 80.

An assignee for the benefit of creditors is not bound by judgments confessed by the assignor.

Nichols v. *Cribbs*, 10 Wis. 76.

As the assignee is the representative of the creditors, he may procure to be set aside fraudulent conveyances by the assignor, though the latter could not question their validity.

Moore v. *Williamson*, (N. J.) 15 Atlantic Rep. p. 587.

An executor may set up fraud and avoid the act of the decedent, for the benefit of the creditors, where the estate is insolvent.

Bouslough v. *Bouslough*, 68 Pa. St. 495.

It is not true that creditors of a corporation can not enforce obligations resting upon stockholders that the corporation might not be able to do.

The Union Mutual L. Ins. Co. v. *Frear Stone Manuf. Co.*, 97 Ill. 537.

"Whilst it is generally true that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor or assignor held it, it is not universally true. Many transactions would be binding on the latter which would not be binding on the assignee. All sales and securities made for the actual purpose of defrauding creditors are of this class."

Casey v. *Cavorac*, 96 U. S. 487–488.

"A trustee of an insolvent in the District of Columbia represents the creditors, and can take advantage of a defect in a mortgage of which the insolvent could not."

Bank of Alexandria v. *Herbert*, 8 Cranch, 36.

"Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment. Liens invalid as against creditors at the time of the assignment remain invalid."

Blandy v. *Benedict*, 42 Ohio St. 295, 299.

"While an assignment for the benefit of creditors remains in force, the right to assail prior judgments and executions recovered against an assignor, on the ground that

they were fraudulent as against creditors, rests, not in the creditors themselves, but in the assignee."

Smith v. *Payne*, 21 N. Y. S. Rep'r, 462; 3 N. Y. Supplement, 826.

It is true that some of the cases cited arose under the U. S. Bankrupt Act, where the statute expressly authorized the assignee to interpose. But the principle of equity thus incorporated in the statute has long been recognized and widely used. Were it not for this wise provision the creditors of an unscrupulous person would be at the mercy of others, perhaps equally unscrupulous, in collusion with an insolvent, and would be deprived of all remedy in many cases.

The statute gave definite form to the equitable principle, and was declarative thereof. See the able opinion of Mr. Justice Miller, showing the weakness of our adversary's position in this case:

"On this consideration one of the main arguments, on which the appellant seeks to reverse the decree, stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors or the bankrupt."

Sawyer v. *Hoag*, 17 Wall. 610.

II. That this gambling transaction was in direct violation of the law of Illinois, where the business was done, will appear from an examination of the Illinois statute, and the decisions of the Illinois courts and of the United States Supreme Court thereupon.

The statute of Illinois referred to is the part of the criminal code of that state relating to "Gambling and Criminal Contracts," and provides:

"Sec. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts so to do, in relation to any of such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"Sec. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, given, granted, drawn, or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing, won by any . . . wager or bet upon any . . . chance . . . or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such . . . bet, to any person or persons so gaming or betting, . . . shall be void and of no effect.

"Sec. 135. All judgments, mortgages, covenants, agreements, assurances, bonds, notes, bills, specialties, promises, and other acts, deeds, securities, or conveyances, given, granted, drawn, or executed, contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser, or other person interested therein; or, if a judgment, the same may be set aside on motion of any person aforesaid, on due notice thereof given.

"Sec. 136. No assignment of any bill, note, bond, covenant, agreement, judgment, mortgage, or other security or conveyance aforesaid, shall, in any manner, affect the defense of the person giving, granting, drawing, enter-

ing into, or executing the same, or the remedies of any person interested therein."

Rev. Stats. Illinois, 1874, pp. 372, 373, c. 38.

1*st*. The courts of Illinois have frequently been called upon to construe this statute in the decision of cases where the illegality of the consideration of the contract has been pleaded, as it was pleaded by Lloyd, trustee, in the case at bar. A few of these decisions will be very useful in the consideration of the present case. It will be observed that this plea of the statute of Illinois can be made in any state where a note or other obligation is sought to be enforced.

A plea that notes sued on were given for a balance resulting from dealings in margins on grain presents a good defense, without regard to where the notes were made or where payable.

Brown v. *Alexander*, 29 Ill. App. 626.

But the Supreme Court of Illinois has gone much further than this. In a recent case, well considered in the able opinion of that court, it was held that this statute could be successfully pleaded by any person interested therein against a judgment theretofore rendered on a negotiable security or other evidence of indebtedness given or executed for any money won by gaming.

The Rev. Stat. Ill., which provides that all judgments, mortgages, bonds, notes, etc., given or executed for any money won by gaming, may be set aside by any court of equity upon bill filed for that purpose by the person giving, entering into, or executing the same, or by any other person interested therein, applies as well to judgments rendered in contested actions as to judgments on confession.

West v. *Carter*, 129 Ill. 249.

Our adversaries claim that this defense should have been pleaded in the original suit, and that after a judg-

ment rendered, it is now too late for a court of equity to entertain this plea made by Lloyd, trustee. But in the same case of *West* v. *Carter*, it was distinctly held:

"Such a suit being authorized by statute, the fact that the illegality of the contract sued on would have constituted a good defense to the action in which the judgment was recovered, does not oust the court of chancery of jurisdiction."

The Supreme Court of Illinois also held, that an agent who, knowingly, aids his principal in effecting an unlawful combination to raise the price of wheat can not recover for advances made for such purpose.

Samuel v. *Oliver*, 22 Northwestern Rep. 499.

The same court also held that where a broker undertakes to deal for his principal in contravention of this same statute, and in doing so makes disbursements or pays losses growing out of such dealing, he can not recover the money so paid or his commissions.

Coffman v. *Young*, 20 Ill. App. 76.

2*d*. This gambling contract in the case at bar was illegal under the law of Ohio, where the action was brought for the foreclosure of the mortgage bonds, and where the decree of foreclosure was rendered.

"Sec. 6934*a*. (Contracts for options on grain, cornering the market, etc.) That whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than twenty, nor more than five hundred dollars, or confined in the county jail not exceeding six months or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void; provided, that the provisions of this law shall only be held to mean

and apply to such contracts where the intent of the parties thereto is that there shall not be a delivery of the commodity sold, but only a payment of differences by the parties losing upon the rise or fall of the market."

Revised Statutes of Ohio (Smith & Benedict, 1890), vol. 2, p. 2010.

3*d*. The general rule of law prevailing throughout the United States is, that a contract made in violation of a statute is void. That when the plaintiff can not establish his cause of action, without relying upon an illegal contract, he can not recover.

Miller v. *Ammon*, 145 U. S. 421.

Embrey v. *Jemison*, 131 U. S. 336.

This gambling contract was also void as against public policy.

It is but a short time since this court was called upon to pass upon the validity of a similar gambling contract, and to pronounce its solemn judgment, that the illegal consideration in such contract prevented the payee from maintaining an action upon the note.

A contract for the purchase of "future-delivery" cotton, neither the purchase or delivery of actual cotton being contemplated by the parties, but the settlement in respect to which is to be upon the basis of the mere "difference" between the contract price and the market price of said cotton futures according to the fluctuations in the market, is a wagering contract and illegal and void, as well under the statutes of New York and Virginia, as generally in this country.

The original payee can not maintain an action upon a note, the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to such contract, or having directly participated in the making of it in the name, or on behalf of, one of the parties.

Embrey v. *Jemison*, 131 U. S. 336.

The opinion in this case was delivered by Mr. Justice Harlan. He quotes the language of Mr. Justice Matthews,

in *Irwin* v. *Williar*, 110 U. S. 499, where the whole subject was very fully considered, and the broad statement was made:

"It makes no difference that a debt or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade."

Further quotation was made, referring to the decision in *Roundtree* v. *Smith*, 108 U. S. 269, as follows:

"But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and can not recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."

4th. In the case of *Pearce* v. *Rice*, 142 U. S., p. 28, this subject has been carefully considered. The case arose in the Circuit Court of the United States for the Northern District of Illinois, and the decision was rendered December 7th, 1891. The facts in this case are set forth in the statement and are too long to be here recited. It is sufficient to say, that the Receiver of The Third National Bank of Chicago had obtained a judgment for a large amount against Hooker & Co. upon four notes which had been given in settlement of differences upon a gambling contract in wheat, the consideration being exactly the same as Preston & McHenry claim against Harper in the case at bar. Pearce, as assignee, intervened in the case, as Lloyd, trustee, has intervened in this case, and claimed the right to show the illegality of the original consideration for which the notes were given, as Lloyd, trustee, here claims to show the illegality of the consideration for which Preston & McHenry received the bonds of the defendant railway company,

upon which bonds they recovered judgment in a prior action in the court below. The opinion was rendered by Mr. Justice Harlan, who quoted the provisions of the Illinois statute, and examined the case of *West* v. *Carter*, which we have above considered. Many cases are cited and examined, and this court asks the pertinent question:

"Did the judgment of the bank establish the validity of those contracts as between Foote and Hooker & Co.? This question must receive a negative answer. Hooker & Co. were not parties to the action at law, and there was no issue in it between them and Foote. Within the law of estoppel, there was no privity between the bank and Hooker & Co. Certainly none that entitled the latter to rely upon the bank's judgment as conclusively establishing their claim against Foote."

Accordingly, the court allowed the evidence showing that the real object of the arrangement between Hooker & Co. and Foote, was not to contract for the actual delivery of grain, but merely to speculate upon the rise and fall in prices, with an explicit understanding that the transactions were to be closed only by the payment of the differences between the contract price and the market price at the time fixed for the execution of the contract. Hence Pearce, as the assignee of Foote, was allowed to go behind the judgment and to have relief against Hooker & Co., and the other parties to the case; and the court added:

"For the reasons already given, that judgment did not estop Foote, or his assignee, from showing, as has been done, the illegal character of the transactions, out of which arose the claim of Hooker & Co. against Foote. . . . The court was at liberty to determine, under the pleadings and evidence, the relief to which the respective parties were entitled."

This case fully sustains the position of Lloyd, trustee,

in the court below, and in this court. The trustee had a perfect right to show the invalidity of the judgment in a foreclosure case, arising from the illegality of the consideration for which the bonds were issued by the railway company; and this trustee was not estopped by the fact that a formal decree of foreclosure had been entered in a prior case. That decree, as to Harper, had no force, and, as to him, was absolutely void. No valid judgment against Harper could be predicated upon that erroneous decree.

The learned judge of the circuit court, at the trial below, should have overruled the motion filed to the answer of Lloyd, trustee, and should have overruled the exceptions.

5th. Lloyd, trustee, was not a voluntary party to the action. He was brought into the case by a supplemental bill, after the plaintiff's testimony had all been taken and after the case had been submitted to the court on final hearing. He was compelled to file an answer instanter. As he had had no previous opportunity to introduce testimony, and as he was allowed to file his answer, the only proper course for the court below to have pursued, under the law, as above shown to have been determined by the Supreme Court of the United States, was to overrule the exceptions and the demurrer, and to give Lloyd, trustee, additional time in which to take testimony sustaining the allegations of the answer. The course pursued by the learned judge was unusual, as his action was erroneous. Before passing upon the exceptions and demurrer, he filed a written opinion deciding the entire case; and, two months later, proceeded to make an entry upon the journal in regard to the exceptions, motion, and demurrer.

In the course of the opinion, which was filed on the 28th of August, 1888, the learned judge used the follow-

ing language with reference to the answer of Lloyd, trustee:

"Waiving all technical questions made with reference to these pleadings, the short answer to both is, that there is absolutely no testimony in the record in support of either the answer or the cross-bill;" apparently ignoring the testimony of Harper, Preston and Eckert, in regard to this fraudulent dealing in wheat upon the Chicago Board of Trade.

In the analysis of the testimony, in the early part of this brief, we have given the names of the witnesses and made reference to the pages of the record where this evidence appears at length.

In any event, there was fully enough shown by the testimony to inform the Court of the gambling nature of the wheat transaction, and to have justified it in following the law as laid down by this Court in the case of *Pearce* v. *Rice*, just cited, and the cases decided by this Court at an earlier date.

It was error to refuse the trustee an opportunity to be heard, and an opportunity to show the illegality of the consideration. Fraud pervaded every part of the transactions of Preston & McHenry. No step in their proceedings was free from the taint. They could not divest themselves of this taint by going through the hollow mockery of taking a decree of foreclosure against an insolvent corporation which made no defense. They can not divest themselves of this taint by trying to hide under the cover of a decree upon a baseless claim; or, under the pretense of seeking to enforce a subscription against Harper which could not have been enforced by the corporation itself.

When the nature of this gambling contract had been once suggested to the Court, by the answer of Lloyd,

trustee, the burden of proof was thereafter upon Preston & McHenry to fully satisfy the Court that there was no gambling in the original transaction out of which their claim against Harper grew.

Cobb v. *Prell*, 15 Federal Rep., p. 774.

The Circuit Court should then have postponed the decision of the case until the supplemental testimony had been presented. This the Court refused to do, and by such refusal error was committed.

THIRD.

1. There was manifest error in the decree rendered in the Circuit Court, so far as the same allowed anything against Lloyd, trustee, except the amount of Harper's original stock subscription of 2,500 shares. It will be borne in mind that this was the only subscription ever made by Harper, and that there is no testimony to show that he ever received any stock whatever. On the contrary, his own evidence is, that he never did receive any stock. Yet, in face of this, after allowing the entire claim of the complainants in the Court below, there follows in the decree this extraordinary language:

"And that the said complainants are entitled to have the entire claim of the defendant, the Cincinnati, Columbus, and Hocking Railway Company, against the said Edward L. Harper; to-wit: The sum of $300,000, with interest thereon from January 5, 1885, the date of the filing of this bill, allowed as against said trustee, for the purpose of securing to the complainants their full proportion of the value of the credit of the said railway company against said Harper's estate, and to have the total sum obtainable upon said railway's credit distributed between and paid to the complainants, *pro rata*, in full of the sums payable by said trustee, according to the amounts of their respective claims hereinbefore allowed as against said trustee."

And there follows an order that, without any other

proof of claim, this entire sum shall be allowed by the trustee, including:

1. The judgments for the amounts supposed to be due upon the stock subscription, viz $322,531 67.

2. In the second place, for an additional $300,000 and interest.

Making a total of more than $700,000, on a stock subscription of $250,000.

We remark upon this:

1. That the Cincinnati, Columbus, and Hocking Valley Railway Company never had any claim of $300,000 against the defendant Harper.

2. That this railway company never pretended to have any such claim.

3. That it never asserted any such claim in this case or elsewhere.

4. The court erred in making such decree, on the meager allegation in the original bill on this point, and with no sufficient evidence by which it could be justified.

Amount allowed in the decree direct.....		$322,531 67
Four years' interest, estimated.....		77,800 00
Fictitious claim, never asserted by the railway company, not sufficiently proved in testimony, and improperly allowed in decree.....		300,000 00
Interest thereon from Jan. 5, '85, estimated.		90,000 00
Total.....		$790,331 67
Actual subscription of Harper.	$250,000 00	
Interest, estimated.....	60,000 00	310,000 00
Erroneous excess.....		$480,331 67

It is obvious, at a glance, that there was error in the amount allowed in the decree of the court below.

The error will be still more apparent, if we consider

the gross injustice done to the other creditors of the insolvent estate by this unwarranted allowance. The claim of Preston & McHenry was about $123,000. Adding the claims allowed the other complainants, and swelling the total by the additions of a large amount of interest, decree was allowed for $322,531 67. This amount was excessive, because the only allowance, if any, which should have been made in the court below, was upon the stock subscription of Harper of $250,000; and this, with the addition of interest, would be less than the amount allowed in the first part of the decree. The other creditors of Harper's estate have a right to insist, through their trustee, that no allowance should be made in favor of any one creditor in excess of the amount actually due; though, if this decree were permitted to stand, there would be a double payment to the complainants in this very case, and they would draw dividends upon more than $800,000, when they are only entitled, at the utmost, to take a dividend upon about $300,000. Any other creditor of the insolvent will draw but one dividend. These creditors seek the sanction of the court to enable them to draw more than twice the amount, *pro rata*, allowed to any other creditor. In other words, upon a claim of about $300,000, this decree of the court below would allow a dividend upon about $800,000.

We ask, with great confidence, for a reversal of the decree below, on the ground of the obvious error in amount.

2. The assignment of Harper, as an insolvent, took place on the 21st of June, 1887. At this time interest ceased on all his obligations of every kind. The dividend to be declared must be computed upon the amount of his liabilities as they then existed. It would be idle to allow

interest against an insolvent estate to run the amounts up to exorbitant figures which would reduce the dividend to a decimal almost infinitesimal. The rule adopted by the courts, has been to abate the interest, according to the nature of the contract, so as to reduce the claim to the net amount due upon the date of the assignment; and we ask the opinion of the court upon this point.

We trust we have made it clear that the decree of the court below should be reversed, and that the case should be remanded, with instructions to the Circuit Court to dismiss the case.

Respectfully submitted,

H. P. LLOYD,

Counsel.

APPENDIX.

THE UNITED STATES OF AMERICA,
WESTERN DIVISION OF THE SOUTHERN DISTRICT OF OHIO. } ss.

At a stated term of the Circuit Court of the Western Division of the Southern District of Ohio, in the Sixfh Judicial Circuit of the United States of America, begun and had in the court rooms, at the City of Cincinnati, O., in said district, on the first Tuesday of April, being the first day of that month, in the year of our Lord one thousand eight hundred and eighty-four, and of the independence of the United States of America the one hundred and eighth.

Present, the Hon. George R. Sage, District Judge.

On Tuesday, the 17th day of June, 1884, among the proceedings had were the following, to wit:

The Union Trust Company of New York, a corporation, Trustee, etc.,
vs.
The Cincinnati, Columbus and Hocking Valley Railway Company, a corporation, and Indiana, Bloomington and Western Railroad Company.

No. 3609.
In Chancery.

Decree for Sale.

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decred as follows, viz.: It appearing to the Court that a decree *pro confesso* to the bill of complaint having been heretofore made herein and entered of record, and no intervening action having been taken by defendants, whereby the allegations of said bill have been controverted or denied, wherefore the Court on consideration do find the equity of the case to be with the complainant, and that concerning the parties hereto all and singular, the allegations and charges of the bill of c mplaint are true; and that there is now outstanding and unpaid bonds of the said Cincinnati, Columbus and Hocking Valley Railway Company, secured by said mortgage described in the bill and dated the second day of January, 1882, at their face value the sum of five hundred and sixty thousand dollars. And the Court do further find that at the option of the holders thereof the principal became due of one hundred and twenty-three thousand two hundred dollars of said bonds at face value; said holders having so elected

and exercised their option on the 11th day of January, 1884, as stipulated in said bonds and mortgage. And the court further find that said holders of said bonds numbered 3, 303, 41, from 77 to 164, both numbers inclusive, 201, from 165 to 178, both numbers inclusive, and from 91 to 213 both numbers inclusive, are entitled to the immediate payment of said overdue interest thereon, amounting to the sum of $14,784, being the interest to January 1, 1884, and there is also due for interest on the balance of said bonds ($436,800) the sum of $52,416, making the amount due in all on said bonds and coupons the sum of $190,400, to which should be added the interest on said overdue coupons at the rate of six per cent per annum, simple interest, which amounts to the sum of $3,024, making the total sum due on said bonds and overdue coupons to January 1, 1884, the sum of $193,424.

RECAPITULATION.

Due on principal of bonds above described.....	$123,200
Interest on above to January 1, 1884.....	14,784
Interest balance ($436,800) bonds to January 1, 1884.	52,416
Interest on overdue coupons.....	3,024
Total amount as above.....	$193,424

But this finding as to the amounts and validity of said bonds and coupons is made as against said railway company only, and even as to said company subject to correction upon the coming in of the report of C. B. Wilby, special master hereinbefore appointed; but said finding shall not affect the right of bond holders between themselves, and all questions relating thereto are hereby reserved for further consideration. Whereupon it is ordered, aejudged and decreed by the Court, that the Cincinnati, Columbus and Hocking Valley Railway Company, on or before the 26th day of June, 1884, pay into the hands of the clerk of this Court, to be subject to the further order of this Court, the said sum of one hundred and ninety-three thousand four hundred and twenty-four dollars ($193,424), together with the interest up to the time of payment accruing since the first day of January, 1884; and also that within the same time the said railway company pay into the hands of the clerk of this court the sum of fifteen thousand dollars, to be applied so far as may be necessary to the payment of the costs, charges and expenses of the complainant herein in this behalf, including its counsel fees, and also to be applied to the payment of all indebtedness incurred by order of this Court by Thomas Hanna as receiver in this case; and in default of said payment it is further ordered, adjudged and decreed by the Court that all and singular the line of railroad of said The Cincinnati, Columbus and Hocking Valley Railway Company, constructed and unconstructed, together with all and singular the right of way, road bed made and partially made, its track laid and superstructure thereunder, together with all

the stations, depots and grounds, rails, fences, bridges, turn-outs, sidings, switches and branches if any, and its rolling stock of all kinds, including engines and cars, and of whatever name or nature; and also all machinery, supplies, tools and fixtures, and any leasehold rights, and interest in contracts for land for the right of way, depot grounds or other purposes of said railroad, including all buildings and structures and rights of every kind of said railway company, used for the purposes of said railroad, or appurtenances thereto, together with all and singular the powers and franchises belonging to said railway company, to be sold as an entirety, the same being in the opinion and judgment of the Court incapable of being sold separately without waste and material injury to the value thereof; and the Court doth order and direct, that all and singular said property, effects, rights and franchises of said Cincinnati, Columbus and Hocking Valley Railway Company be sold by Thomas Hanna, who is hereby appointed special master commissioner for that purpose, and to this end he is hereby invested with full power in said capacity as such special master commissioner to execute and carry into effect the order of sale now here made, and to do and perform all such other matters and things in the premises as shall be ordered and required of him in this behalf. And the Court doth further order, adjudge, and decree, that said special master commissioner, before offering said premises, franchises and property for sale, shall cause to be advertised, once at least, the time, place and terms of the sale thereof, in a newspaper of general circulation in the City of Cincinnati, Ohio, setting forth in such advertisement a concise and pertinent designation of said subject-matter so to be sold, and a like advertisement in a newspaper of general circulation in the City of New York once not less than sixty days prior to said sale, once not less than thirty days prior to said sale, and once not less than ten days prior to said sale, at Cincinnati and New York; which sale shall be made at public auction, at the court-house of this Court in the City of Cincinnati, Ohio, to the highest bidder for all cash in hand or cash in hand not less than twenty thousand dollars to be applicable to the payment of all the costs and charges herein specified and referred to, as a part of the purchase price of said property, and for the balance of such purchase price the bonds or overdue interest warrants or coupons secured by said deed of trust dated January 2, 1882; that is to say, after payment of all costs, charges, United States and state taxes, in cash, such percentage of the face value of said bonds and coupons be applied upon said purchase price as would be applicable toward the payment of said bonds and coupons under the further order of this court, directing the distribution of the proceeds of said sale counted as money, and such further sum of money as shall be necessary to make up the total amount of the bid of the purchaser. And it is further ordered, adjudged and decreed that, for the purposes aforesaid, an order of sale shall be issued by the clerk of

this court, under the seal thereof, embracing so much of this decree in substance as relates to the duties of said special master commissioner, and directing and requiring him to carry the same into execution, and to make return thereof to this court, with a report of his doings in the premises. And if for any cause said master commissioner shall not make sale of said property, rights and franchises upon the order to be issued as aforesaid, a further order for the same purpose may be issued by the clerk, upon the written request of counsel for complainant. And it is further ordered, that the said commissioner making said sale, shall accept no bid from any bidder who shall not first place in his hands or deposit with him as a pledge, that he will make good his bid in case of its acceptance by the Court, the sum of twenty thousand dollars in money, and upon payment of the purchase price as herein provided, and upon compliance with the terms of the purchase by the purchaser or purchasers, and upon the decree of confirmation of sale by the Court, said special master commissioner shall by deed to be executed in the usual form as may in the State of Ohio be required to pass real estate, convey the premises and property so to be sold to the purchaser or purchasers, his or their heirs or successors and assigns, and said purchaser or purchasers, by virtue of said deed, and the decree and order of this court upon such full compliance with the conditions of sale (after the confirmation thereof) and the orders of court, made and to be made herein, touching the payment of the purchase price, shall be entitled to take and hold all of said property, including rights, franchises and appurtenances so as aforesaid ordered to be sold, free and clear of said mortgage in said bill of complaint described and referred to, and from all liabilities of said Cincinnati, Columbus and Hocking Valley Railway Company, not prior liens to said mortgages thereon, and said property shall thereupon be delivered into the possession of said purchaser. The Court reserves also that all errors which have intervened in the statement of sums and amounts or in calculations on which such statements are founded in this decree contained, and all clerical errors therein may and shall be corrected upon the order of the court to be made upon the motion of any party interested in the same.

The United States of America, Western Devision of the Southern District of Ohio, ss.:

I, William C. Howard, clerk of the Circuit Court of the United States, within and for the Division and District aforesaid, do hereby certify, that the foregoing entry is truly taken, and correctly copied from the journal of this court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Cincinnati, this 27th day of June, A. D. 1884.

[SEAL]

WM. C. HOWARD, *Clerk.*
By R. C. GEORGI, *Deputy.*

146-630

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 59.

HARLAN P. LLOYD, TRUSTEE OF EDWARD L. HARPER, ET AL.
APPELLANTS,

Vs.

EMMA C. PRESTON, EXECUTRIX OF JOSIAH W. PRESTON, DECEASED, ET AL.,
APPELLEES.

BRIEF FOR APPELLEES.

J. W. WARRINGTON,
Of Counsel for Appellees.

OHIO VALLEY CO., CINCINNATI.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. TERM No. 59.

HARLAN P. LLOYD, TRUSTEE OF EDWARD L. HARPER ET AL. *Appellants,*

vs.

EMMA C. PRESTON, EXECUTRIX OF JOSIAH W. PRESTON, DECEASED, ET AL. *Appellees.*

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This case is brought to subject certain assets of a railroad company—unpaid stock subscriptions—to the payment of certain judgments against that company. Edward L. Harper, on whose behalf this appeal is prosecuted, was the principal stockholder. As it seems to us, therefore, what happened between Harper and any of appellees by way of negotiation or agreement, prior to obtaining those judgments against the railroad or in obtaining the judgments themselves, can have no proper place in this case; for no fraud or misrepresentation is claimed against any of the appellees in respect to any of these matters, and obviously the negotiations and agreements between any of them and Harper represent voluntary settlements which antedate the judgments and ought not to be disturbed. But as Harper's trustee has insisted on going behind the judgments and opening up settlements, we wish to submit a brief historic sketch which will show precisely what questions are legitimately involved and just how they arise.

Previous to October, 1881, Edward L. Harper, for whom appellant was thereafter appointed trustee in insolvency, was engaged in the purchase and sale of grain on the Chicago Board of Trade, through W. E. McHenry, J. W. Preston and Preston and McHenry, appellees herein. After Harper had discontinued making such purchases and sales, it was ascertained by the parties that Harper was then owing Preston and McHenry a large sum of money, the amount of which was disputed by him, and, for the purpose of fully settling and compromising the claims which appellees had against Harper, an agreement was entered into between the parties, of date October 12, 1881, which is fully set forth in the record. (Exhibit A, Rec. pp. 207–8.) In said agreement it is recited that

"Whereas the said Harper is the owner of a narrow-gauge railroad now known as the Columbus, Washington & Cincinnati railroad, together with all its privileges and appurtenances; and

"Whereas the above named parties respectively (meaning Howard Eckert & Co., J. W. Preston & Co., W. E. McHenry and Preston & McHenry) have claims against said Harper, which he is desirous of paying and liquidating in bonds to be secured by a mortgage lien upon said railroad and appurtenances, it is agreed between the said Harper and the other parties hereto respectively" in substance and effect that Harper should cause the gauge of the road to be changed to a standard gauge and extend the same certain distances at each end for the purpose of making connections with other roads, and said changes and extensions to be made within four months from the date of said contract.

Harper further agreed within the same period "to cause to be organized under the laws of Ohio a railway company, to be named the Cincinnati, Columbus & Hocking Valley Railway Company," and to convey to the new corporation the road so changed and extended, with the privileges and appurtenances thereunto belonging, and to cause said new company to issue its coupon bonds of $100, $500 and $1,000 each, payable in forty years with interest at 6 per cent. per annum payable semi-annually, to be secured by first mort-

gage upon the said railroad and its extensions and all other property and franchises of said company then owned or thereafter to be acquired, said first mortgage bonds not to exceed in the aggregate an amount equal to the rate of $20,000 per mile of the length of said road and extensions. Harper likewise agreed to cause said company to issue income bonds of like denominations and amounts payable in forty years and not to exceed in the aggregate $20,000 per mile of said railroad.

For the purpose of paying the claims against him as aforesaid, Harper agreed to deliver of the said first mortgage bonds at the par value thereof, to J. W. Preston & Co. $75,534, to W. E. McHenry $1,250, to Preston & McHenry $137,622, to H. Eckert & Co., agents for W. E. McHenry and Preston & McHenry, $500; and likewise to deliver as a bonus at the par value thereof, 50 per cent. of the above amounts respectively, in said income bonds; all of which bonds the said parties agreed to accept in full payment of Harper's indebtedness to them.

Pursuant to this agreement, Harper organized the Cincinnati, Columbus & Hocking Valley Railway Company (Exhibit B, Rec. p. 209) with a capital stock of $2,500,000, divided into 25,000 shares of $100 each, the certificate of incorporation being filed in the office of the Secretary of the State of Ohio, November 7, 1881. (Rec. p. 210.) Books for subscriptions to the capital stock of the company were opened December 10, 1881, in Cincinnati, Ohio, and 2,500 shares of the capital stock were subscribed by E. L. Harper and one share each by eight other persons, all of whom were in Harper's employ and subscribed and became stockholders at his instance and request. (Ans. Rec. p. 250.) The amount of stock so subscribed was slightly in excess of 10 per cent. of the authorized capital stock of said company, and was made so in obedience to statutory requirement of Ohio.

Immediately after the stock subscriptions were made, the stockholders met and elected seven directors composed of stockholders of said company other than E. L. Harper and W. C. Herron. (Rec. p. 212.)

On the same day, December 13, 1881, the Board of Directors met

and the officers of said company were chosen and by-laws were adopted (Rec. pp. 213 to 215), and at this meeting Harper submitted to the board a proposition in writing to broaden the narrow-gauge railway owned by him to a standard gauge and to extend the same in accordance with his agreement aforesaid, of October 12, 1881, with Preston and McHenry; and he (Harper) agreed to sell the same, as broadened and extended, to the new company for $1,800,000 par value of the securities of the new company, as follows: $600,000 of first mortgage, forty year bonds; $600,000 of income bonds, and $600,000 of the capital stock, including subscriptions already made. (Rec. p. 216).* This proposition was accepted by the directors of the corporation at this meeting, subject to ratification by the stockholders. (Rec. p. 216). On January 2, 1882, the stockholders met and ratified the action of the directors and accepted Harper's proposition. (Rec. pp. 217-218.)

On June 20, 1882, the Board of Directors met and found that E. L. Harper had complied with his contract, the railroad as changed and extended being twenty-eight miles long. It was thereupon resolved that the road be accepted from Harper and that he be paid any balance in bonds, stocks or moneys which might be due him on said contract. (Rec. p. 218.)

The only meeting held, or action had, thereafter by the directors (none having been held thereafter by the stockholders) was on the 20th of February, 1883. (Rec. p. 219.)

The Cincinnati, Columbus & Hocking Valley Railway Company issued and delivered to Harper its first mortgage, six per cent., forty year gold bonds at the rate of $20,000 per mile, payable to bearer, and income bonds of the same amount, all of which were secured by mortgage on said company's entire railway, etc. Harper in turn delivered to Preston and McHenry, in settlement of the indebtedness due them, $214,000 of first mortgage bonds and $107,200

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*The printed record at p. 216 does not correctly show the proposition, but a true copy thereof can be found in the amended bill of complainant on page 247 of the record.

income bonds, which were accepted by them in full settlement of their demands against Harper. (Rec. p. 209.)

The Cincinnati, Columbus & Hocking Valley Railway Company having defaulted in the payment of interest due thereafter, four several suits were brought in the Circuit Court of the United States for the Southern District of Ohio, Western Division, by appellees, who were then the owners and holders of certain of said bonds, some of whom acquired the same by purchase from Preston and McHenry, against the Cincinnati, Columbus & Hocking Valley Railway Company, and judgments were obtained at the October term, 1884, aggregating [redacted] $255,938.48; writs of *fieri facias* were sued out on said judgments and the same were returned unsatisfied. (*Vide* bill and answer showing this to be alleged and not denied.)

Thereafter, on January 5, 1885, appellees filed their bill of complaint in this action in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the Cincinnati, Columbus & Hocking Valley Railway Company, E. L. Harper, et al., alleging in substance the recovery of said judgments by them, the issuing of writs of *fieri facias*, the return of said writs unsatisfied, the subscriptions for said capital stock by E. L. Harper and others, that no part of said subscriptions had been paid by said subscribers, the issuing by the corporation to W. D. Lee of certificates for 3,000 shares of said stock at the special instance and request, and for the use and benefit, of said E. L. Harper, that nothing whatever had been paid to said company for said 3,000 shares of said stock, and that said railway is insolvent: that the president, manager and secretary and all the directors of said railway company were at the time of the organization of said company and ever since have been and were in the employ of said E. L. Harper and under his control; that knowing said company to be insolvent they neglected and failed to demand or collect any of the credits of said corporation; that said corporation had abandoned all action under its charter; that nothing in the way of collection of the subscriptions and credits due said company could be accomplished through said corporation or its direc-

tors; and praying that said subscribers and each of them be required to pay to complainants the amount due said company by reason of said subscriptions and that said Harper and Lee be also required to pay complainants the amount due said corporation by reason of the issue of said 3,000 shares of its capital stock as aforesaid to W. D. Lee, and for all proper relief. (Rec. pp. 1 to 9.)

On March 25, 1885, the defendants, including E. L. Harper, filed an answer to this bill, admitting the obtaining of the judgments and the other facts which have been stated above, by failing to deny them, but sought to avoid the judgments and the relief which complainants asked in their bill solely upon the ground that complainants "had full knowledge of the manner in which Harper had fulfilled his said contract and of the history of said transaction." (Rec. 18, 19.) To this answer complainants filed a replication in the usual form. (Rec. p. 20.)

On June 7, 1887, the complainants filed an amended bill, alleging in substance that the railroad property transferred by E. L. Harper to the Cincinnati, Columbus & Hocking Valley Railway Company was not worth one-fiftieth part of the amount of bonds and mortgages issued thereon by said railway company to said Harper in pretended payment thereof, all of which was well known by said Harper and by said directors and by every stockholder who voted on said proposition, and that the said directors and stockholders voting thereon voted and acted in relation thereto solely at the direction and dictation of said Harper and in his and their individual interest and behalf, and in disregard of the rights and interest of the corporation they pretended to represent, and for the purpose of shielding and protecting said Harper and themselves from their due and lawful liability to complainants herein and to creditors of said corporation on account of their aforesaid subscriptions to its capital stock, and that said proposition and the acceptance thereof in the manner hereinbefore set forth were and are fraudulent and void as against the rights of complainants, and praying therein that the pretended agreement by and between said E. L. Harper and said Cincinnati, Columbus & Hocking Valley Railway Company and its directors,

whereby the said board of directors assumed to release or otherwise treat as paid and discharged the liability of said Harper and themselves to said defendant railway company on account of their subscriptions to its capital stock be annulled and set aside and declared to be of no effect, etc. (Rec. pp. 247-249.)

To this amended bill E. L. Harper filed an answer admitting in substance and effect that he made the proposition to said railway company; that the same was accepted by said company; that said road was conveyed by him to said company; that said bonds and mortgage securing them were executed and delivered, and that said Board of Directors were either employed by or related to him; but he denied that the action of said Board of Directors was his individual action and alleged that the action of said railway company was just what it purported to be, and he alleged that the object, well known to complainants, was to put said company in a position where it could execute the bonds which said Harper agreed to transfer to said Preston and others. He also alleged that said Preston and associates knew at the time of making said contract that Harper was to have, and also agreed that he should have, all the stock of said company, as well as said bonds, as a consideration for the transfer of said road to said company; that said Preston and associciates knew that there was to be no money paid on any subscription to the capital stock of said company; that the subscriptions to the capital stock were a mere matter of form and made simply as a mode of creating a corporate organization that could issue bonds; and he denies that the same was done in fraud of the rights of said Preston and associates. He alleges further that said Preston and McHenry had full knowledge of the value of said road and the securities covered by said mortgage. He further admits that said Board of Directors carried out his wishes and accepted said proposition, and alleges that it was in pursuance of the wishes and understanding of said Preston and associates, but he denies that there was any fraudulent purpose in it. (Rec. p. 250.)

On July 30, 1887, complainants filed a replication to this answer. (Rec. p. 251.)

Afterwards, on March 28, 1888, complainants filed a supplementary bill alleging in substance and effect that said E. L. Harper on the 21st day of June, 1887, made an assignment for the benefit of his creditors in accordance with the laws of the State of Ohio relating to insolvent debtors, and that Harlan P. Lloyd had been duly appointed and qualified and was then acting as the sole trustee of the property and assets of said Harper, and asking that the said Lloyd, as such trustee, be made a party defendant in said cause and required to answer and show cause why complainants should not have the relief and judgment as prayed for in said original bill and amendment thereto, and that he be required to allow as against the property and estate in his possession and control of the said E. L. Harper, any judgment or decree which might be entered in said cause in favor of complainants, or any of them, and for such other and further relief in the premises as equity might require. (Rec. pp. 252, 253.)

Thereupon, on the same day, Harlan P. Lloyd, as trustee of the estate of E. L. Harper, filed his answer and cross-bill to the original bill, the amended bill and the supplementary bill and to certain intervening bills filed in this cause, in which he admits, by failing to deny, all and singular the allegations in each of the bills filed by complainants, but seeks to avoid the same by alleging in substance that the claims of the complainants and all other parties to said suit against the said Harper or himself as assignee, were invalid; that the only consideration on which said claim or claims were founded was a gaming transaction in the form of a deal in options in wheat in Chicago, Illinois, in which gaming transaction there was no wheat actually owned or bought or sold, but only a betting on the future prices of wheat, in which the said complainants won from said Harper very large sums of money, amounting in the aggregate to more than $600,000, of which Harper paid in cash or its equivalent not less than $400,000, and that this claim of complainants was for a pretended balance of said winnings and for which said Harper gave to said complainants the bonds of said railway company, on which bonds said judgments referred to in said petition were founded, and on no other consideration whatever, and he prays that all of said petitions of complainants be dismissed.

In his cross-bill he asks for a judgment against Emma C. Preston, administratrix of the estate of Josiah W. Preston, deceased, William E. McHenry and Eugene H. Lahee in the sum of $400,000, the amount so alleged to have been won between the 1st day of January and the 1st day of October, 1881. (Rec. pp. 254, 255).

To this answer complainants filed exceptions on account of the insufficiency thereof, also a motion to strike out a portion, because of its irrelevancy and impertinency, and also filed a demurrer to said cross-bill. (Rec. pp. 256, 258.)

On October 24, 1888, an entry was made sustaining complainants' exceptions and motion to the answer and sustaining their demurrer to the cross-bill of said Harlan P. Lloyd, trustee. (Rec. p. 264).

There [redacted] the court filed its opinion finding upon the evidence taken prior to Lloyd's appointment as trustee, that complainants were entitled to the relief prayed for (Rec., pp. 259, 263), and on the 15th day of March, 1889, a final decree was entered in this cause against E. L. Harper and W. D. Lee in favor of complainants, in the sum of $322,531.67, and directed Harlan P. Lloyd, as trustee of the estate of E. L. Harper, to allow the same as a good and valid claim against the estate of Harper, assigned.

It is to reverse this decree that an appeal has been prosecuted by Harlan P. Lloyd, trustee, appellant herein.

ARGUMENT.

I

In the absence of fraud and collusion in obtaining judgments against a corporation, they are conclusive against the stockholders.

It is not claimed that the judgments were obtained by complainants by fraud or collusion. Consequently the only question is, are the judgments as to Harper and his trustee *res adjudicata?*

We affirm that they are. It was so held in *Hawkins* v. *Glenn*, 131 U. S. 319, wherein Chief Justice Fuller at page 332, says:

"We think it can not be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, and that this is involved in the contract created in becoming a stockholder."

This doctrine is affirmed in *Glenn* v. *Liggett* 135 U. S. 533, 542. See also *Chicago & A. Bridge Co.* v. *Anglo-Amer. Pac. & Pro. Co.* 46 Fed. Rep. 584, 587.

Bissett v. *Ky. Riv. Nav. Co.*, 15 Fed. Rep. 353.
Hawes v. *Petroleum Co.*, 101 Mass. 385.
Henry v. *Vermillion, etc., R. R. Co.*, 17 Ohio Rep. 187, 190–1.
Slee v. *Bloom*, 20 Johns 669.
Hampsen v. *Weare*, 4 Ia. 13.
Donworth v. *Coolbaugh*, 5 Ia. 300.
Came v. *Brigham*, 39 Me. 35.
Milliken v. *Whitehouse*, 49 Me. 527.
Wilson v. *Pittsburgh, etc., Coal Co.*, 43 Pa. St. 424.
Grund v. *Tucker*, 5 Kan. 70.
Morawetz on Private Corp., Sec. 860.

Counsel for appellant argues that because Harper was not a party to the cases in which the judgments were rendered in favor of complainants, he is not bound by the record therein made. Our contention is, and no citations are necessary to show, that not only parties but their privies are bound by the record of a judgment, and that all questions which were raised or which might have been raised in the cases wherein the judgments were obtained, became *res adjudicata* as to both classes.

That Harper was privy to the proceedings touching the body of which he is a member, see *Sanger* v. *Upton*, 91 U. S. 56, in which it is said of an order made for the payment of the balance due upon certain stock:

"It was not necessary that the stockholders should be before the court when it (the order) was made, any more than they should have been there when the decree of bankruptcy was pronounced.

That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not in this action question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose. She might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard; but it does not appear that any such application was made. As a stockholder, she was an integral part of the corporation. *In the view of the law, she was before the court in all the proceedings touching the body of which she was a member.*" Page 58–9. (Italics ours.)

See also:

Hawkins v. *Glenn*, *supra* (at p. 327).
Morgan Co. v. *Allen*, 103 U. S. 498, 509.

We contend, therefore, that the cases cited in appellant's brief at pages 21 to 25, have no application to the case at bar. Indeed, in the case of *Safford* v. *Weare*, 142 Mass. 231, cited at page 22 of his brief, it is held that when one is privy to a judgment, it is not open to him to attack it collaterally.

II.

Appellant claims, however, that E. L. Harper is entitled to be relieved from liability on his subscription to the capital stock of the Cincinnati, Columbus & Hocking Valley Railway Company, by reason of the allegations in their answer, "that said J. W. Preston & Co. and others with full knowledge of the manner in which said Harper had fulfilled his said contract, and of the history of said transaction as above stated (in said answer), accepted said bonds and received the same in full satisfaction of said agreement."

It will be recollected in the agreement made between Harper and Preston and McHenry, that Harper agreed "*to cause to be organized* UNDER THE LAWS OF OHIO *a railway company.*" Therefore it will be important to consider in this connection what the laws of Ohio were at that time as regards the formation of railway companies. The Statutes of Ohio, so far as applicable, were as follows:

Sec. 3243. "An installment of ten per cent. on each share of stock shall be payable at the time of making the subscription, and the residue thereof shall be paid in such installments, and at such times and places, and to such persons, as may be required by the directors of the corporation."

Sec. 3244. "As soon as ten per cent. of the capital stock is subscribed, the subscribers of the articles of incorporation, or any five of them, shall so certify, in writing, to the Secretary of State, and thereupon shall give notice to the stockholders, as provided in section three thousand two hundred and forty-two, to meet at such time and place as they may designate, for the purpose of choosing not less than five nor more than fifteen directors who shall continue in office until the time fixed for the annual election, and until their successors are chosen and qualified: provided, that in case all subscribers are present in person, or by proxy, such notice may be waived in writing, and the incorporators of the company shall be liable to any person affected thereby, to the amount of any deficiency in the actual payment of said ten per cent. at the time of so certifying."

* * * * * * *

Sec. 3286. "A (railway) company may issue bonds, convertible or otherwise, bearing a rate of interest not exceeding seven per centum per annum, to an amount not exceeding two-thirds of its capital stock, actually subscribed, for one or more of the following purposes: Completing or extending its road, constructing branch roads, laying double or additional track, increasing its machinery or rolling stock, building depots or shops, making improvements, paying its unfunded debts, or redeeming its bonds; and it may secure the bonds issued for such purposes by mortgage on its property, or otherwise, if authorized by the vote, in person or by proxy, of holders of a majority of the stock upon which all the installments called for by the Board of Directors have been paid; but such vote shall be taken at a meeting of stockholders, of which thirty days' notice shall be given."

Sec. 3287. "A company may borrow money, at a rate not exceeding seven per centum per annum, for any purpose that the same may be needed in its business, and execute bonds or promissory notes therefor in sums of not less than one hundred dollars; and it may secure the payment of such bonds and notes by a pledge of its prop-

erty and income; but the aggregate indebtedness authorized by this and the preceding section shall not exceed the amount of the capital stock of the company."

Sec. 3288. "Such mortgage or pledge may be made by the company executing a deed of mortgage, or other instrument in writing, for the purpose of securing the payment of the loan of money made, or the notes, bonds, or other evidences of indebtedness issued by the company, which mortgage may include the personal as well as the real property of the company." (*See Revised Statutes of Ohio.*)

When, therefore, E. L. Harper agreed to cause a railroad company to be organized "under the laws of Ohio," and to cause its bonds to be issued, he thereby impliedly incorporated into that agreement the statute law of Ohio in respect to such corporations.

There were issued to Harper $1,120,000 of bonds (one-half first mortgage and one-half income bonds) and $600,000 of stock, to pay him for the narrow-gauge railroad and its appurtenances transferred to the new company. In order to make the issue of $1,120,000 of the bonds legal under the laws of Ohio, it was necessary under the provisions of Sections 3286–7 to have a corporation with a capital stock of at least $1,120,000, and two-thirds thereof actually subscribed. It is true that the capital stock of the new corporation was fixed at $2,500,000, but there were only 2,508 subscribed by E. L. Harper and the others, which, as we have before stated, was slightly in excess of ten per cent. of its authorized capital. Therefore, when E. L. Harper agreed with Preston and McHenry "to cause to be organized *under the laws of Ohio* a railway company" and to issue its bonds, he agreed that it should be done *in accordance with* the statutes of Ohio. Had he done what those statutes required, the new company would have become possessed of subscriptions in par value of not less than $1,120,000, whereas in fact everything of value which the new company ever received from Harper in addition to his subscription, was the transfer of the narrow gauge railroad and its appurtenances as widened and extended, with a mortgage thereon of $40,000 per mile. Yet the value of the entire railroad, as shown by the

testimony, if free from incumbrance, did not exceed $96,000. (See testimony of Ralph Peters, Supt. Penna. R. R. Co., Rec. pp. 59–60.) But other witnesses placed it at a sum far less than $96,000, namely Chas. E. Henderson, a practical railroad man, testified that it was worth from $2,000 to $2,500 per mile (Rec. p. 22); J. H. Kirk, a practical railroad man, who operated the road for the Receiver in charge, placed the value of whole road at $25,000. (Rec. p. 29.) J. F. Ely placed it at only $100 per mile by reason of the dangers attending the removing of the rails for use as old iron. (Rec. p. 32.) All of these witnesses agreed that the road was worth simply what its rails would have brought for old iron at the time.

We maintain therefore that the evidence shows conclusively that both the statute and the contract were violated in this regard, because the stock subscriptions were liabilities for money or money's worth, and consequently could not be discharged by transfer of property of such value. The property so transferred was but a small fractional part in value of the nominal amount of the subscriptions. We make a liberal concession to our adversary when we concede that stock subscriptions under the laws of Ohio can be paid in anything except cash.

Henry v. *Vermillion, etc., R. R. Co. supra.*
Warner v. *Callender*, 20 O. S. 191–208.

But yielding as we do for the purpose of this argument that stock subscriptions in Ohio may be discharged by transfer in good faith and for fair value of property necessary for corporate objects, yet the difference between the actual value of the property transferred here and the nominal value of the subscriptions was so great as to show evidence of fraud in the transactions between Harper and his instruments representing the corporation.

Coit v. *Gold Amalgamating Co.*, 119 U. S. 343.
Douglass v. *Ireland*, 73 N. Y. 100.
Lake Superior Iron Co. v. *Drexell*, 90 N. Y. 87.

These cases show that it is sufficient to prove mere inadequacy in value of property, under such circumstances, in order to establish a charge of fraud.

Apart from all this, it should be borne in mind that Harper immediately took to himself from said company $1,120,000 of securities, out of which he was to pay complainants. (Ans. Rec. p. 19.) The transaction involved in the organization of this railroad company, therefore, amounts to this: that Harper made a large subscription himself and had employes of his also to make subscriptions, and attempted to discharge the contractual obligations created by such subscriptions by transferring this railroad property to the company, only to require it all to be re-transferred to him by way of mortgage, in a sum largely in excess of its value. He made only a nominal transfer to the company in order to enable it to re-transfer to him all of the value there was in the property. The case is, therefore, worse than it would have been upon the charge of mere inadequacy in value, for it is in reality one of giving no value at all. Ought there then to be any doubt upon the question: have the obligations which were created by making said stock subscriptions been satisfied or discharged? If they have not, then we insist that the law is clearly in favor of our claim that they must be paid now. In addition to the cases before cited, see

County of Morgan v. *Allen*, 103 U. S. 498–509.
Sawyer v. *Hodge, Adm'r*, 17 Wall. 610.
Weatherby v. *Baker*, 35 N. J. Eq. 501.
Chouteau et al. v. *Dean*, 7 Mo. App. 210.
Osgood v. *King*, 42 Ia. 478–483.
Brant v. *Elan*, 59 Md. 124–5.
Crawford v. *Bixler*, *id.* 599.
Young v. *Erie, etc., Co.*, 31 N. W. Rep. 814.
Courtright v. *Burns*, 14 Cent. Law Jour. 89–90–91.
Stewart v. *Phœnix Ins. Co.*, *id.* 432–5.

In addition to this we submit that the agreement between Harper and Preston and McHenry having been reduced to writing and in-

volving a requirement to follow a specific statutory mode, it was incompetent to introduce parol evidence to prove that Preston and McHenry agreed to any other mode and especially to the plan adopted by Harper for organizing the railroad company.

Bast v. *Bank*, 101 U. S. 93–96–97.
Forsythe v. *Kimball*, 91 U. S. 291–4.
Maryland v. *Railroad Co.*, 22 Wall. 105.
Howard v. *Thomas*, 12 O. S. 201.

Aside from the legal proposition just stated and supported, we urge that any fair analysis of the testimony will show that Preston and McHenry did not become cognizant of the method which Harper adopted to organize his railway company until long after the bonds were delivered and the whole transaction closed between them, and indeed not until after they obtained access to the books of the railway company after the appointment of the receiver of that company. We will therefore quote from the testimony:

J. W. Preston testified as follows:

Q. 16. Who delivered them (the bonds) to you?

A. E. L. Harper.

Q. 17. Did you at that time know anything about the way in which the Cincinnati, Columbus & Hocking Valley Railway Company had been organized?

A. I never knew anything about its organization.

Q. 18. Had you ever had any talk with any of its officers?

A. I had talked with Mr. Harper.

Q. 19. Only?

A. Only; yes. I had talks with Mr. Gimperling also during this time, between October 12th and February.

Q. 20. Did you learn from any of them anything about the manner in which the organization had been perfected?

A. No, sir.

Q. 21. Did you know anything about the transactions of the Board of Directors of that company?

A. Nothing at all.

Q. 22. Did you know anything about the connection of its stockholders up to that time?

A. No, sir.

Q. 23. Was there anything ever said to you concerning any of the business transacted at any meeting of the Board of Directors of that corporation, or at any meeting of the stockholders of that corporation, by Mr. Harper or anybody else connected with that road?

A. No, sir.

Q. 24. Did you know anything concerning the manner or means by which the subscribers to the capital stock of that company had paid for the same at the time you received these bonds, or claimed to have paid for their stock?

A. No, sir; I knew nothing about it.

Q. 25. Did you have any conversation with anybody connected with that road as to what was given in payment for the bonds and capital stock of the Cincinnati, Columbus & Hocking Valley Railway Company?

A. No, sir.

Q. 26. Did you ever have any conversation with E. L. Harper at any time in regard to releasing him from his liability as a subscriber to the capital stock of that corporation?

A. No, sir.

Q. 27. Did you ever have any talk with him about that subject or relating to his liability as a subscriber to the capital stock of that company?

A. No, sir. (Rec. pp. 40, 41.)

J. W. Preston, recalled:

Q. 1. Have you read the testimony of Mr. Harper, one of the witnesses in this case?

A. Yes, sir.

Q. 2. State what took place, Mr. Preston, at the interviews you had with Mr. Harper in regard to the matters which led up to the contract of October 12, 1881, and who were present at those conversations, the substance of what was said at them, and what you did in connection with them, giving the language as near as you can, and when they took place, or about when.

A. In September or October, 1881, E. L. Harper became indebted to the firm of J. W. Preston & Co. and Preston and McHenry to the extent of some two hundred and thirty odd thousand dollars.

I could not tell you the exact amount. Mr. McHenry and myself came down to Cincinnati to try and effect a settlement with Mr. Harper. After various interviews with Mr. Harper, at which Mr. Wilshire was always present—I think there may have been once or twice that he was not—but almost universally he was with us. The matter was talked over in various ways, and finally Mr. Harper made a proposition through Mr. Wilshire to us that he had a narrow-gauge railroad some twenty miles in length here in the State of Ohio, and he thought we could make some dicker whereby we could settle the account by the purchase of that road.

Q. 3. Give it to you?

A. If we would take that road as it was he would turn it over to us in payment of this indebtedness. He thought that the road could be bonded for twenty thousand dollars a mile. Other roads were bonded at that rate and this road he had just bought for a certain sum of money. He may have said that he could sell it for something more than he gave for it. I don't remember the amount or anything further than that the property was worth more than he had paid for it. After some talk with him in regard to it and with Mr. Wilshire with regard to the property, the kind of property or the possible value of it, and a consultation with another party here, Mr. McHenry and I decided that we would go up to Waynesville, near the western terminus of the road, and see some parties there in regard to it. We went to Waynesville and consulted with Israel Wright, who was once vice-president of the road, had once been an officer and concerned in the building of it. He introduced us to a gentleman by a name I don't know. He was a banker. After talking with this gentleman with regard to the property, without seeing it at all we decided that it was not worth while for us to entertain the proposition at all, and came back and so reported to Mr. Harper. This proposition was then made to extend the road with the Little Miami on the west and the Ohio Southern on the east, making an extension of eight miles, I think, or a little more.

Q. 4. Made by whom you had better state.

A. Made by Mr. Harper, and to make the road a standard gauge, on which he would issue twenty thousand dollars of first mortgage bonds, twenty thousand dollars of second mortgage bonds, and twenty thousand dollars of stock on each mile of the road, twenty thousand dollars of income bonds instead of second mortgage bonds. After some time—some days, perhaps, of dickering on the matter—we

finally accepted that proposition, and the contract was drawn on the 12th day of October.

Q. 5. Now, what was said, if anything, by you or by Mr. Harper in any conversation prior to the execution of the contract marked Exhibit A of the testimony in this case in regard to the question of stock in the corporation which Mr. Harper undertook to cause to be organized in that agreement, as near as you can recollect?

A. Before this contract was made the agreement or the proposition from Mr. Harper was that he should organize a railroad company under the laws of the State of Ohio, and proceed then to change the gauge of this road and extend it, issuing the bonds and the stock. He proposed to us that if we would take stock in the road he would be glad to have us do it, and would make us officers of the road as a sort of inducement. I told Mr. Harper that I did n't want any stock in the road; that under the laws of the State of Ohio I did n't choose to make myself responsible as a stockholder, knowing the stringency of the local law in regard to stock corporations in this State.

Q. 6. Was anything stated at any of these conversations in relation to Mr. Harper becoming a subscriber to the capital stock of his proposed railroad company?

A. Nothing whatever.

Q. 7. Was the subject discussed at all between you?

A. No, sir.

Q. 8. Never at any time?

A. No.

Q. 9. Nothing was ever said between you in regard to the stock except that Mr. Harper proposed to give you stock, which you declined to take?

A. That is all; he simply proposed to organize the railroad company under the laws of Ohio, without reference to his being one of the stockholders at all.

Q. 10. When did you first know that Mr. Harper was a stockholder or a subscriber to the capital stock of the proposed corporation?

A. Not until after the road had gone into the hands of a receiver and we had access to the books of the company.

Q. 11. Was any proposition ever made to you by anybody at any time referring to the question of your releasing Mr. Harper from any liability upon his subscription to the capital stock of the proposed corporation?

A. No, sir.

Q. 12. Did you ever discuss it with Mr. Harper?

A. No.

Q. 13. Or anybody else?

A. No, sir. (Rec. pp. 179-181.)

William E. McHenry:

Q. 17. Do you know anything about the organization of the Cincinnati, Columbus & Hocking Valley Railway Company and of E. L. Harper's connection and management of it? If so, state what you know about it.

A. I know nothing whatever of it except that in a certain contract to which I was a party, made with Harper, it was a corporation to be organized under the laws of the State of Ohio, and further than that I know nothing of it; anything more than that my knowledge from being in this suit has led me to believe that the railway company and Harper were one.

Q. 18. Do you mean from this particular lawsuit alone or from your connection with the litigation relating to the Cincinnati, Columbus & Hocking Valley Railway Company?

A. My general connection with the whole matter.

Q. 23. Now, when did you first know of the manner in which Mr. Harper had proceeded in the organization of the Cincinnati, Columbus & Hocking Valley Railway Company?

A. After the suit to foreclose was commenced, we obtained possession of the books of the company.

Q. 24. Did you get what knowledge you have of Mr. Harper's connection with that organization from the books and papers delivered to the receiver in this suit?

A. Yes, sir.

Q. 25. Had you at any time previous to that had any communication or any knowledge communicated to you by Mr. Harper or by any of the officers or stockholders of that company touching the manner in which it had been organized?

A. None whatever.

Q. 26. I wish to call your attention to Exhibit C of the testimony in this case, found upon page 10 of that exhibit, and to ask you when you first had knowledge of that portion of Exhibit C, being the proposition made by E. L. Harper to the Board of Directors of the Cincinnati, Columbus & Hocking Valley Railway Company.

A. I can not remember the date accurately.

Q. 27. About when?

A. It was very soon after the receiver obtained possession of the books of the company.

Q. 28. It was the time of the examination over before Wilby?

A. It was somewhere along there; it was the first time I saw the book.

Q. 29. You never knew of that transaction before?

A. I never heard of such a thing until I saw it there.

Q. 30. Did you ever before that time know of the way in which the subscribers to the capital stock of the defendant railway corporation had attempted to pay for their subscriptions to that capital stock? I mean prior to the time of the examination before Mr. Wilby, May 16, 1884.

A. No, sir.

Q. 31. You had no knowledge, then, of the manner in which E. L. Harper had fulfilled his contract of October 12, 1881, or of the history of the transactions relating to the organizations of the defendant railway corporation until about the time of the examination before Mr. Wilby?

A. I had not. (Rec. pp. 50, 51, 52.)

William E. McHenry re-called:

Q. 1. Have you read the testimony of Mr. Harper in this case?

A. Yes, sir.

Q. 2. Will you state, Mr. McHenry, what occured between you and Mr. Harper and Mr. Wilshire previous to the execution of the contract of October 12, 1881, or at the time of the execution of that contract, and what, in fact, that contract was in the light of having read Mr. Harper's testimony?

A. During the year 1881 I was a commission merchant in city of Chicago. I did a great deal of business for Mr. Harper, in which I made him a great deal of money.

Mr. Riddle: I don't want you to go into that. I want you to come down to October 12, 1881. I want to know what took place at the conversatien after your failure when you came down here to get your money from Mr. Harper.

A. In the course of several interviews with Mr. Harper, in which were present Mr. Preston, Mr. J. W. Wilshire, Mr. E. L. Harper and myself, we endeavored to make a settlement of our claims against Mr. Harper. The first proposition we had from him was to turn over

to us a narrow-gauge railroad in Ohio for the full amount of our debt, which we refused.

Q. Then what proposition was made to you?

A. We had several conferences, and, finally, a proposition was made by Mr. Harper to take the narrow-gauge railroad and cause a company to be organized under the laws of Ohio, the gauge of the road widened and extended to Jeffersonville, on the Ohio Southern, and Claysville, on the Little Miami, or at or near Corwin, called Claysville Junction now. All these conversations and conferences between the parties I have referred to finally resulted in a contract being drawn, which is known in this case as Exhibit A, and dated October 12, 1881.

Q. 4. Now, was there anything agreed upon at that time as to the capital stock of the coporation required of him to be organized? If so, what was it or what occurred? What occurred at the conversations leading up to that contract of October 12, 1881, in regard to the stock in any corporation? What was the conversation on that subject?

A. There never was, to my knowledge, any conversation whatever on the subject of stock, except that Mr. Harper wanted us to take some of the stock in the road, which we refused on the ground of the stock liability in the State of Ohio.

Q. 5. Was the question of the subscription of Mr. Harper to the capital stock of the corporation proposed to be organized discussed at these conversations?

A. The subject never was mentioned.

Q. 6. When did you first know that Mr. Harper had subscribed to the capital stock of the Cincinnati, Columbus & Hocking Valley Railway Company?

A. At the time that we had access to the books of the company after the road went into the hands of the receiver.

Q. 7. Did you ever have any talk with Mr. Harper touching his subscription to the capital stock of that corporation?

A. None whatever.

Q. 8. At any time?

A. Never.

Q. 9. Did you ever have any agreement with Mr. Harper or did you ever have any conversation with Mr. Harper in which it was agreed that he should have the capital stock of said corporation and the bonds of the corporation for the road?

A. None whatever.

Q. 10. Do you recollect what Mr. Harper swears on that subject?

A. My recollection of Mr. Harper's testimony on that subject is that he swears that he was to have all the bonds and stock of the road for it.

Q. 11. For the road?

A. For the road.

Q. 12. What have you to say in regard to that testimony?

A. I think Mr. Harper is mistaken on the subject.

Q. 13. Did you ever have any such understanding with him?

A. None whatever.

Q. 14. Did you ever have any conversation with him leading up to that subject?

A. None whatever.

Q. 15. An no time?

A. At no time.

Q. 16. When did you first learn that Mr. Harper had made a written proposition to the Cincinnati, Columbus & Hocking Valley Railway Company, which proposition is in evidence as part of Exhibit C, the minutes of the company?

A. At the same time that I saw the book containing his subscription to the capital stock after the road went into the hands of the receiver and I had access to them. (Rec. pp. 195, 196, 197.)

J. W. Wilshire, a witness called by appellants (Rec. pp. 148, 149, 150, 151 and 152) corroborates both Preston and McHenry upon this subject, and he finally sums up his testimony as follows:

X-Q. 71. Your understanding of the contract as you now have it and state it was derived from the paper itself, was it not?

A. Entirely so.

X-Q. 72. You mean exclusively so, do you not? You mean it was entirely and exclusively obtained from the written contract, do you not?

A. Yes, sir; in other words, I thought that everything was embodied in that contract—in that paper which you have mentioned as Exhibit A.

X-Q. 73. And that is your understanding to-day, is it not?

A. That is my understanding to-day, exactly.

* * * * * *

X-Q. 112. Was there ever any conversation at either of these

meetings at Mr. Harper's office, as you have described it, at which anything was said about Messrs. Preston and McHenry releasing Mr. Harper from his stock liability or stock subscriptions?

A. I have no recollection of any such conversation. I remember nothing except the refusal to take the stock. On that occasion I remember nothing having been said about the stock at all.

X-Q. 113. Do you recollect anything that was ever said at either of these meetings concerning stock at all except that Preston and McHenry would not take any of it?

A. I can not answer that definitely, because the *modus operandi* of organizing this road was discussed very freely at various times. Of course, stock being part of the organization, that might have been mentioned.

X-Q. 114. Have you any recollection of what was said except that Preston and McHenry would not take any of it?

A. I have not now any recollection of the conversation that ensued on that point.

X-Q. 115. All these conversations, if I understand you, took place prior to the time that you carried the triplicate copies of the contract down to be signed?

A. That is as I remember it; yes, sir.

X-Q. 116. And those contracts were intended to embody and embrace all that was said—all that was agreed upon, I mean?

A. That was my understanding of it.

X-Q. 117. And they do so, so far as you know it, now; so far as you understand, that was exactly the terms upon which the settlement was made embodied in that contract?

A. You mean Exhibit A?

X-Q. 118. Exhibit A; yes.

A. Yes, sir.

The testimony of the three witnesses as shown above establishes conclusively, and it was so treated by the trial court, that no such agreement as Harper states and as is alleged in his answer, was ever entered into between appellees and Harper.

RIGHTS OF APPELLEES OTHER THAN PRESTON AND McHENRY.

Besides the question of notice to the complainants, just discussed, we wish to remark, in passing, that no claim is made that any of

the complainants had notice or were put upon inquiry as to Harper's methods in creating his corporation, excepting Preston and McHenry. The other complainants, as the record shows, obtained their bonds in good faith for valuable consideration and before maturity, in total ignorance of any defense that could be made in respect to the manner in which they were issued, or the company was organized.

J. W. Preston testified (Rec. p. 52):

Q. 32. What connection had the other complainants in the bill, Charles J. Hilbert, Murray Nelson, William T. Baker, Abraham Poole, William A. Kent, Selah Young, Jr., and James S. Sherman, with the ownership of any of the bonds, and how did they come into the possession of them and when?

A. They came into the possession of them some where about February 15, 1882, receiving them in payment for an indebtedness of Preston and McHenry.

Q. 33. Did they know anything about the Cincinnati, Columbus & Hocking Valley Railway Company except such knowledge as they had from the contract made between the parties, which is marked A of this testimony?

A. None to my knowledge.

See also testimony to the same effect of W. E. McHenry, pages 203, 204 and 205. There is no testimony opposed to this.

The bonds are negotiable in form and the cases in this court touching such instruments obtained under such circumstances, are too numerous to require any citations to support the proposition that complainants other than Preston and McHenry are in any event entitled to recover. In making this claim on behalf of the remaining complainants, of course we do not mean to yield one iota of the strength of our claim that Preston and McHenry are likewise entitled to recover.

RIGHTS OF TRUSTEE NO GREATER THAN THOSE OF HARPER.

Counsel for appellant maintains that Lloyd, trustee, has greater rights in this case than Harper had, because he, as such trustee, stands

as the representative of the creditors of Harper; and he says, on page 25 of his brief, that "the books abound with cases showing how constantly courts both of law and of equity allow a trustee, an assignee or an executor, to avail himself of defenses not allowed to the assignor or the decedent." We concede if a debtor confessedly insolvent transfers his property to another for the purpose of securing his creditor in preference to other creditors and the same is prohibited under the law of the State in which it is done, that his assignee could have the sale set aside, on the ground of its being a fraudulent transaction, even though the assignor could not.

And such is the character of cases which are cited by appellant's counsel to sustain his proposition.

We do not dispute this doctrine, but say in answer to the argument that it is wholly inapplicable to the case at bar. It is no where claimed or alleged that Harper, with a fraudulent design or collusively, permitted the judgments to be rendered against the corporation. It is idle therefore to cite cases showing what an assignee or an executor may do when fraudulent conveyances have been made or when judgments have been fraudulently confessed by an assignor or by a decedent whose estate is insolvent.

QUESTIONS AFFECTING COMPROMISE BETWEEN HARPER AND PRESTON & McHENRY IRRELEVANT.

Counsel for appellant also states in his brief on page 27 that the alleged gambling transaction, involved in the purchase and sale of wheat by Harper, was in direct violation of the law of Illinois as shown by the statutes and the decisions of the courts of that State and of this court. It is scarcely necessary to say that it was a disputed question between Harper and Preston & McHenry about his liability upon those claims and that the dispute was voluntarily and honestly compromised by the parties. In settlement of that disputed claim Harper transferred to the complainants the obligations of a third party, namely: the bonds of the Cincinnati, Columbus & Hocking Valley Railway Company. Now, how can it be fairly urged where a

disputed claim has been compromised with full knowledge of all the facts, as was done here, that the agreement of such compromise is unlawful and can not be enforced? It is the policy of the law to encourage settlements by which litigation is avoided.

The law is clear that the compromise of a disputed claim is a good consideration.

In *Bank* v. *Geray*, 5 Pet. 98, a bill was filed by Anna Geray as administratrix of her husband, to enjoin the bank from proceeding against her on a consent judgment upon a note on which her husband had become security, and which was discounted at the bank for the accommodation of one Merrill, upon a promise by the counsel for the bank that if she did so consent and did not dispute her liability upon the note (it being claimed by her at the time that she had a valid legal defense existing against the suit), the bank would immediately proceed by execution to collect the amount from the principal debtor, Merrill. Relying upon those promises she made the agreement, and judgment was taken against her and Merrill for the amount of the note. The bank failed to collect the judgment against the principal debtor and was about to proceed against her, when she filed her bill against the bank. The defendants contended that the contract by which they agreed to release her from any liability thereon, was without consideration to support it, but the court in disposing of the question said at page 113:

"It is enough that the bank considered it (the validity of the endorsement) a doubtful question; and that they supposed they were gaining some benefit by foreclosing all inquiry on the subject; and the complainant by precluding herself from setting up the defense, waived what she supposed might have been of material benefit to her. That the bank considered it of some importance to shut out this defense, is fully shown by the testimony of Magruder. He says it was known to the bank before the judgment was confessed, that many of their suits against endorsers for trial at that term were in jeopardy in consequence of a late decision of the court as to the insufficiency of the demand on the fourth, instead of the third day of grace. So that this question, at the time the contract was entered into, was considered by the bank at least doubtful. And to permit a subsequent judicial

decision on this point in their favor as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning a most mischievous principle."

Central Trust Co. v. *Wabash, etc., R. R. Co.*, 29 Fed. Rep. 546
Lipsmeier v. *Vehslage*, Id. 175.
Graselli v. *Lowden*, 11 Ohio Stat. 349, 356.
Callisher v. *Bischoffsheim*, L. R., 5 Q. B. 449.
Jones v. *Rittenhouse*, 87 Ind. 348.
Parker v. *Enslow*, 102 Ill. 272.
Miles v. *New Zealand Alford Est. Co.*, 32 Ch. Div. 266.

In the contract above referred to between the parties, of date October 12, 1881 (Rec. p. 207), it is expressly stated that Preston and McHenry had claims against Harper which he was desirous of paying and liquidating in bonds; and by the fifth paragraph of the contract Harper agrees to deliver to said parties in payment of their respective claims said bonds at their par value, thereby indicating at the time of signing the contract that Harper recognized that Preston and McHenry had valid claims against him. Therefore it can not be successfully claimed that Preston and McHenry had not reasonable grounds at least to expect that they could recover upon their claims.

We insist, then, that neither Harper nor his trustee have ever had the right in this case to such a defense, because (1) Harper's obligation upon a subscription to the stock of the railway company, was one running in favor of the railway company and not one running directly in favor of these complainants; so that it is obviously irrelevant in this action to discuss something, or attempt to create an issue about something, which does not bear directly upon the contractal relations between Harper and the railway company at the time he subscribed to its stock; (2) the money due upon stock subscriptions is a trust fund—especially in the case of an insolvent company—to be used only for the benefit of the creditors of the company; and (3) Harper himself, both by his compromise and by his answer filed herein before his insolvency, *waived* all defenses, even if any existed, against the claims of Preston and McHenry.

The only legitimate question in this connection is: Whether the complainants or any of them have the right to invoke the aid of a court of equity to collect and distribute a trust fund of the corporation among its creditors. The solution of this can not involve a question between Harper and the company's *creditors*, but between him and the *company;* for the appellees are for the purposes of this case, invoking the aid of this court to enforce not merely or especially *their* rights, but the rights of the company as against Harper. Hence it would be more appropriate, as it seems to us, for Harper's trustee to address himself and his defense to the question whether anything was done or said to relieve Harper from his obligation on his subscription contract with the railway company. Did the company impose upon Harper or practice any fraud upon him in obtaining that subscription? Has Harper ever in fact paid the subscription? Harper and his counsel presented an answer and evidence addressed to those points, but Harper's trustee desires to inquire whether an acknowledged obligation by Harper as early as October, 1881, to deliver certain bonds to Preston and McHenry, was based upon sufficient or legal consideration. The two issues are so far separated that it would be impossible to try them both in one case, because they arise between totally different parties.

III.

AMOUNT OF JUDGMENT CORRECT.

Counsel for appellant claims, finally, that there was manifest error in the decree rendered in the Circuit Court so far as it allowed anything against Lloyd, trustee, except upon Harper's original subscription of 2,500 shares (Brief p. 36). Complainants alleged in their bill that W. D. Lee, of Newark, Ohio, held certificates representing 3,000 shares of the par value of $100 each of the capital stock which were issued and delivered to Lee on or about June 1, 1882, at the special instance and request and for the use and benefit of Harper, and that nothing whatever was paid to the Company for this stock. By the

answer, as we have seen, none of the allegations in the bill of complaint were denied.

It was, therefore, unnecessary to adduce proof in support of these allegations. However, complainants did produce proof by introducing in evidence the agreement made between E. L. Harper and W. D. Lee with respect to this identical stock. The contract itself is not printed in the record, but was before the court below. (Rec. p. 39.) It is fair to assume that the court in deciding the case found the facts concerning the contract to be as alleged in our bill. Clearly then the judgment of the court below was correct, for Harper was bound not only upon his subscription for 2,500 shares but upon the 3,000 shares of stock taken by Lee in his name for the use and benefit of Harper. Under the Ohio statute Harper was a stockholder as regards these 3,000 shares.*

Counsel for appellant seems to think that the decree gives judgment twice on the same claim, but this is not the fact. Possibly judgment might fairly have been entered against Harper in favor of the creditors of the company both on his subscription for 2,500 shares and on the 3,000 shares; but it was not so done. The 3,000 shares, for which certificates were issued, were treated in the decree as inclusive of the 2,500 shares for which he subscribed.

The amount due for the 3,000 shares, with interest from the day of filing the bill to the first day of the term at which decree was rendered, would be $337,500, and judgment was taken for a smaller sum than this, that is, for the aggregate amount of the judgments with interest set up in the bill, and no more; and it was only "for the purpose of securing to the complainants their full proportion of the value of the credit of the said railway company against said Harper's estate, and to have the total sum obtainable upon said railway credit distributed between, and paid to the complainants, *pro rata*, in full of the sums payable by said trustee," that the trustee was required to

* Sec, 3259. The term "stockholders," as used in the preceding section, shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another.

"also allow the said claim of said railway company against the said Edward L. Harper, and distribute and pay the dividends arising thereon to the said complainants in the ratio of their said several claims" as found in the decree. (Rec. pp. 269, 270.)

We therefore submit that in every aspect of the case appellees are entitled to have the decree affirmed.

J. W. WARRINGTON,

Of Counsel for Appellees.

NOVEMBER 20, 1892.

Office Supreme Court
FILED.
NOV 28 1892
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 59.

HARLAN P. LLOYD, TRUSTEE OF EDWARD L. HARPER, ET AL.
APPELLANTS.

Vs.

EMMA C. PRESTON, EXECUTRIX OF JOSIAH W. PRESTON, DECEASED, ET AL.,
APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEES.

J. W. WARRINGTON,
W. F. BOYD,
Of Counsel for Appellees.

OHIO VALLEY CO., CINCINNATI.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. TERM No. 59.

HARLAN P. LLOYD, TRUSTEE OF EDWARD L. HARPER ET AL. *Appellants,*

vs.

EMMA C. PRESTON, EXECUTRIX OF JOSIAH W. PRESTON, DECEASED, ET AL. *Appellees.*

SUPPLEMENTAL BRIEF FOR APPELLEES.

I.

PEARCE *v.* RICE DISTINGUISHED.

Owing to the short space of time which transpired between the receipt of the brief for appellants and the calling of this case for argument and the fact that we were engaged in a trial during that time, our former brief was prepared and printed with more than ordinary haste. As a consequence we overlooked the significance which our adversary seems to attach to the decision in *Pearce* v. *Rice*, 142 U. S. 28. (Brief, p. 32).

As we understand that case it decides that a *bona fide* holder for value of negotiable paper can recover against a guarantor of that paper although he guaranteed and parted with the paper in payment of a balance due upon a gambling transaction within the meaning of the statutes of Illinois prohibiting the same and furnishing remedies for relief in respect thereof; but that neither the guarantor nor his assignee as against the brokers who knowingly and designedly

conducted such gambling transaction for such guarantor was, *under the peculiar circumstances of that case*, concluded by the payment so made.

The decision in that case settles the law in this case as regards the appellees who were *bona fide* holders of the railway bonds which were reduced to the judgments, mentioned in our bill. (See our former brief, pp. 24, 25.) Further in support of the claim so made in that brief that the appellees other than Preston & McHenry were *bona fide* holders of the negotiable bonds and for that reason alone are entitled to protection under *Pearce* v. *Rice*, *supra*, see *Railroad Co.* v. *National Bank*, 102 U. S. 14, 23.

The present case, however, is distinguishable from *Pearce* v. *Rice* as regards the binding effect upon Harper and his trustee of the judgments sought to be satisfied herein and of the contract made between Harper and Preston & McHenry dated October 12, 1881. The distinguishing features are several in number and are very plain:

(1.) In *Pearce* v. *Rice*, the brokers, Hooker & Co., were not entitled to set up the judgment of the Third National Bank of Chicago against their principal, Ira Foote, as to the sum which that judgment represented in excess of the actual amount due from Hooker & Co. to the bank, because Hooker & Co. were neither parties nor privies to the suit in which the judgment was obtained (see language of Mr. Justice Harlan bottom p. 38 to top p. 40); whereas by reason of Harper's ownership of stock in the Cincinnati, Columbus & Hocking Valley Railway Company he was privy to the judgments which are sought to be satisfied in the case at bar.

If, at the time appellees brought their suits and recovered judgments at law upon the bonds of the Cincinnati, Columbus & Hocking Valley Railway Company, there existed, under the prohibitory statutes aforesaid of Illinois, a defense against those bonds, that defense must have been founded upon the *illegality* of the consideration which was given by Preston & McHenry for the transfer to them by Harper of the *title* to the railway bonds; such a defense,

if it existed, was open both to the railway company and to Harper in the suits to recover judgments upon those bonds.

It was open to the railway company because as the maker of the bonds it was competent for it to show, as a bar to a recovery, that the holder held them simply by virtue of a contract void for *statutory illegality.*

Gaither v. *Farmers' Bank*, 1 Pet. 37.
Sproule v. *Merril*, 29 Me. 260.
Strong v. *Tompkins*, 8 Johns. 97; see also Mr. Ames' notes on this case, 1 Ames' Cas. on Bills and Notes, 352.
Story on Promissory Notes, Sec. 193.
Holman v. *Ringo*, 36 Miss. 690.
Green v. *Seymour*, 3 Sand. Ch. 291, 292.
Johnson v. *Bush*, 3 Barb. Ch. 240.

The defense was also open to Harper, because he was the only stockholder, except as to eight shares in as many holders, and was owing the railway company upon his unpaid subscription to its capital stock and thereby under secondary liability to payment of the bonds or the judgments recovered upon them. The company's admitted insolvency made this liability of Harper certain. He was therefore directly interested in the subject matter and had a right to make defense and also the right to adduce testimony and to cross-examine the witnesses adduced on the other side, and was consequently *a privy* within the meaning of the language adopted by this court in *Litchfield* v. *Goodnow*, 123 U. S. at 551, and the cases there cited.

Observe, we do not say, nor do we have to show, he was either a necessary party or a party in fact in the sense that he was served with process and really an actor, but that he was by unmistakable token a privy. The corporation stood for him and under the circumstances represented him and his rights.

In the bill it is alleged in substance that the appellees recovered judgments against the Cincinnati, Columbus & Hocking Valley Rail-

way Company for certain sums of money as damages, costs and charges, which the orators had sustained in the suits as by the record of the judgments in those cases will more fully appear and to which reference is made; that subscription to the capital stock of said company to the extent of 2,500 shares of the par value each of $100 was made by E. L. Harper and not paid: that the officers and directors of the company were at the time of the organization and ever since have been in the employ of Harper and under his control, and knowing of the insolvency of the company, the officers and directors neglect to demand or collect said subscription. That the corporation has abandoned all action under its charter, and that nothing in the way of enforcing collection of the subscription can be accomplished through the company or its officers and directors. (Rec., pp. 1 to 7.) This is not denied.

Harper's trustee in his answer "denies the validity of the claim of the complainants * * * and alleges that the only consideration on which said * * * claims were founded was a gaming transaction in the form of a deal in options in wheat in * * * Chicago * * * in which gaming transaction there was no wheat actually owned or bought or sold but only a betting on the future prices of wheat in said market, in which the said complainants won from said Harper * * * very large sums of money * * * which Harper actually paid in cash or its equivalent not less than $400,000, and that this claim of complainants for $214,000 * * * was for the pretended balance of said winnings at gaming * * * for which Harper gave to complainants *certain bonds of said railway company* to said amount of $214,000, *on which bonds said judgments* referred to in said petition were founded." (Rec., pp. 254–5.)

To these averments exceptions were sustained. The theory on which they were sustained will be discussed hereafter; but it is sufficient for the present to say that they show *the railway bonds* were given by Harper to Preston & McHenry and were made the foundation of the judgments mentioned in the bill and for the satisfaction of which this suit is maintained.

It follows that if we assume the transaction, under which those bonds were given by Harper to Preston & McHenry, was one within the inhibition of the statutes of Illinois, the very *title* by which they were held by Preston & McHenry was void for *statutory illegality*. Therefore, when the suits were brought upon the bonds it is to be conclusively presumed that the railway company or Harper or both actually made and were defeated upon the defenses of such statutory illegality; or it is clear that one or both of them were bound then and there to make or cause to be made that defense, and having failed to do so are as certainly concluded as if the defense had been made.

COMPROMISE HERE NOT WITHIN ILLINOIS STATUTES.

(2.) Nothing in the statutes of Illinois prohibits the making of a compromise and settlement of *a dispute* between brokers and their principal regarding a claim on the part of the former that a transaction involved an honest dealing in a commodity and a claim of the principal that it involved a betting upon future prices. Such a compromise or settlement differs essentially from a mere payment in money or in evidences of indebtedness of a claim upon a transaction *acknowledged* by both parties to be within the inhibition of the statute. This is materially strengthened here by the fact that the contract of compromise and settlement was made in Ohio, to be performed in Ohio, and is consequently only incidentally and remotely affected by the Illinois statute. It is submitted that the instrument signed by Harper and Preston & McHenry October 12, 1881 (Exhibit "A," Rec., 207–8) represents such a compromise and settlement as aforesaid, while the payment of Foote to Hooker & Co. was for a balance upon a plain if not acknowledged transaction within the statute in question.

Armstrong v. *American Exchange Bank*, 133 U. S. 433, 469.

The authorities found on pages 27–8 of our former brief show that such a compromise or settlement, as was thus made by Harper

and Preston & McHenry, alone forms a sufficient and valid consideration and takes it out of the Illinois statutes.

NATURE OF TRANSACTION TRIED BELOW ON PLEADINGS AND EVIDENCE AND FOUND UNTAINTED.

(3.) But beyond all this, there is to be found a conclusive answer to the claim of opposing counsel as to the alleged illegality of the transaction between Harper and Preston & McHenry. It is this: Although Harper himself in his answer did not expressly allege or claim that the transaction between him and Preston & McHenry was illegal within the meaning of the statute of Illinois, he in fact offered evidence—presumably all the evidence—to support such a claim. Harper's trustee, at pages 11 to 13 of his brief, refers to all that evidence, and we need not repeat it or cite it further. We insist that a mere reading of it will satisfy your Honors that it was insufficient to establish the claim of either Harper or his trustee that the transaction in question was within the inhibition of the Illinois statute.

In passing upon this feature of the case, the court below said:

"Pending this suit Harper became insolvent and made a general assignment in favor of his creditors. Thereupon his assignee was, upon his motion, made a defendant and filed an answer setting up that the sole consideration for the claims against Harper upon which said bonds were delivered by him to the complainants was a gaming transaction in the form of a deal in options in wheat at Chicago, in which there was no wheat actually owned or bought or sold, but only a betting on future prices, and that the complainants won from Harper more than $600,000 on which he paid in cash, or its equivalent, not less than $400,000, and that complainants' claim was for the pretended balance of said winnings. For the amount so paid by Harper the assignee by cross-bill prays for decree and judgment.

"*Waiving all technical questions made with reference to these pleadings*, the short answer to both is that there is absolutely no testimony in the record in support of either the answer or the cross-bill. Harper testifies that the parties claimed, 'after absorbing some four hundred thousand dollars in cash of margin on wheat in Chicago,' that he owed

them a balance of over $200,000, which he disputed, but finally settled and compromised. On cross-examination of Preston, he was asked by Harper's counsel whether the consideration claimed to have been received by Harper for the bonds which he agreed to transfer to complainants did not grow out of dealings between Harper and complainants on the Chicago Board of Trade. To this question complainants' counsel objected and instructed the witness not to answer, and he did not answer. He was not pressed, but Harper's counsel stated, as appears by the record, that he proposed to show that the contracting parties had dealings on the Chicago Board of Trade; that the books of the complainant would not show the amount claimed; 'that the entire transaction was disputed and repudiated by Harper as fraudulent;' that the claim was exaggerated, and that it was in settlement of this fictitious claim that he compromised with complainants.

"This is all that appears in testimony, or that it was proposed to show. Taken altogether, it falls short of what is required to establish that complainants' claims arose from a gambling transaction. *Irwin* v. *Williar*, 110 U. S. 499." Rec., pp. 261-2. (Italics ours.)

See also:

Smith v. *Roundtree*, 108 U. S. 269.
Higgins v. *McCrea*, 116 U. S. 671.
Barber v. *White*, 123 U. S. 392.

Plainly the court below treated, and we insist rightly treated, Harper and Harper's trustee as one and the same person in law, the latter having no greater rights than the former. This is further shown by that portion of the first paragraph of the final decree which sustains complainant's exceptions and motion to the answer of Harper's trustee (Rec., 264). Harper's trustee, however, wishes to take advantage of this portion of the decree upon the theory that the court below did nothing more in respect of his answer than merely to sustain our exceptions and motion.

But, as shown, the court in effect treated the allegations of the trustee's answer as an attempt to conform his pleading to the evidence which Harper himself had offered to support the claim of illegality. Surely this court will not disturb the decree simply because Harper's

trustee now complains that his answer was disposed of without his being allowed to offer further evidence; for, as the record shows, Harper was given abundant time to take all the evidence obtainable, and it nowhere appears, so far as we recollect or can discover, that the trustee even asked for further opportunity to take evidence. Hence, it is clear that the whole question of illegality of the transaction between Harper and Preston & McHenry has really been tried and disposed of by a finding on the issue so made that the transaction was *bona fide* and not a betting on future prices. Will this court disturb this finding of fact and the decision thereon?

It is scarcely necessary to state that the trustee's so-called cross-bill must fall with his answer, for it has no other foundation to support it. Besides, it is in form and substance an action at law against a part only of appellees, and can not for that reason alone be injected into this proceeding in equity.

II.

INTEREST.

As regards appellants' claim that interest was allowed upon the claims of appellees to the first day of the term at which the judgments were rendered instead of the date of Harper's assignment, we beg to submit, before closing, that it is too late for counsel to raise such a claim for the first time in this court; for he made no motion for a new trial and took no steps below to have a correction made in that behalf, if indeed he was entitled to one, which we deny.

Hawkins v. *Glenn*, 131 U. S. 319, bottom p. 335 and top p. 336.

Respectfully submitted,

J. W. WARRINGTON,
W. F. BOYD,
Of Counsel for Appellees.

trustee now complains that his answer was disposed of without his being allowed to offer further evidence; for, as the record shows, Harper was given ample time to take all the evidence obtainable, and it nowhere appears or is pretended on any disclosure that the trustee ever asked for further opportunity to take evidence. Hence it is clear that the whole question of the validity of the transaction between Harper and Preston & McHenry has really been tried and disposed of by a finding on the issue as to whether the transaction was *bona fide* and not a betting on future prices. Will this court disturb this finding of fact and so discourage betting?

It is scarcely necessary to state that the trustee's unverified cross-bill must fall with the answer, since it has no other foundation to support it. Besides, it is not even pretended that any statement of law against a part only of appellees, and one not contained in the bill, can be injected into this proceeding on appeal.

II.

INTEREST.

As regards appellants' claim that interest was allowed upon the claims of appellees to the first dividend upon which the judgments were rendered instead of the date of Harper's assignment, we beg to submit, before closing, that it is too late for counsel to raise such a claim for the first time in this court; for he made no motion for a new trial and took no steps below to have a correction made in that behalf, if indeed he was entitled to one, which we deny.

Hawkins v. Gibson, 151 U. S. 319, bottom p. 333 and top p. 336.

Respectfully submitted,

J. W. WARRINGTON,
W. T. BOYD,
Of Counsel for Appellees.

46-646

Office Supreme Court U.
FILED.
OCT 18 1892
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CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES.

THE STATE OF WASHINGTON, on relation of Henry L. Yesler,
Plaintiff in Error.

vs.

WILLIAM F. PROSSER, *et al.*, constituting the Board of Harbor Line Commissioners, *Defendants in Error.*

No. .....

BRIEF OF DEFENDANTS IN ERROR.

W. C. JONES,
Attorney General.

———— ————, *of Counsel.*

O. C. WHITE, STATE PRINTER.

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——— ———, *of Counsel.*

OLYMPIA, WASH.:
O. C. WHITE, . . . STATE PRINTER.
1892.

STATEMENT OF THE CASE.

Prior to the admission of the State of Washington into the union the relator constructed a wharf in front of what is now the city of Seattle, extending outward from his upland into the navigable waters of Elliot Bay, an arm of Puget Sound in which the daily tide ebbs and flows, and erected warehouses on his wharf, and he has maintained these structures up to the present time.

When the state was admitted into the union, the people adopted as a part of their constitution the following provisions:

ARTICLE XV.—HARBOR AND TIDE WATERS.

SECTION 1. The legislature shall provide for the appointment of a commission, whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof on either side. The state shall never give, sell or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce.

SEC. 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and

other structures upon the areas mentioned in section 1 of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks and other structures.

SEC. 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

ARTICLE XVII.—TIDE LANDS.

SECTION 1. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

SEC. 2. The State of Washington disclaims all title in and claims to all tide, swamp and overflowed lands patented by the United States: *Provided*, The same is not impeached for fraud.

ARTICLE XXVII.—SCHEDULE.

SEC. 2. All laws now in force in the Territory of Washington, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: *Provided*, That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation.

Pursuant to these constitutional provisions the legislature at its first session enacted a law designed to put Article XV above into operation. This law is found on pages 736 and 737 of Vol. I, Hill's Code. Sec. 2120 defines the duties of the board of commissioners as follows:

"The duties of the said harbor line commissioners shall be

to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side, and to perform all other duties provided and prescribed in article fifteen of the constitution of the State of Washington, and all such other duties as the law may prescribe; and wherever and whenever said board of harbor line commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays and inlets of this state, they shall file the plat thereof in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located; and from and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor lines of that portion of the navigable waters of this state."

In pursuance of this legislation, the defendants, W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards and D. C. Guernsey, were duly appointed harbor line commissioners of the State of Washington, and qualified and entered upon the discharge of their duties as such. In pursuance of this legislation, and in the performance of the duties thereby enjoined upon them, they caused an accurate survey to be made of the harbor of the city of Seattle, and located a harbor line along the entire harbor front and in front of the area so occupied by the relator with his wharf. They also caused an accurate plat or map to be made of the harbor front of the city of Seattle, upon which they caused to be plainly marked or indicated the harbor line so located by them, together with the location of all improvements, wharves, warehouses, coal bunker, etc.

They also determined the width of the strip which the constitution reserves from sale, and caused a line to be marked on the plat indicating the inner line of this area.

This action was commenced in the superior court of King County by the filing of an affidavit and petition for a writ of prohibition to restrain the board and the other officers made defendants from causing the plat to be filed. The defendants moved to quash the alternative writ issued thereon, which motion was overruled by the court, and defendants appealed to the supreme court of the state.

That court reversed the action of the court below, and its opinion is found in 2 Wash. 530.

From that decision the relator prosecutes this writ of error.

ARGUMENT.

In preparing this argument we are embarrassed by the fact that relator's counsel have not yet submitted their brief, and we are left to infer what positions will be taken by them in this case as nearly as can be conjectured from the papers heretofore filed and arguments made in this litigation. Relator will contend—

First: That the action of defendants violates the provisions of the fourteenth amendment to the federal constitution which enjoin the states from depriving any person of life, liberty or property without due process of law.

Second: That the acts of the harbor line commissioners are in violation of sec. 7, chap. 907, Statutes-at-Large, page 454, Laws 1889–1891.

The *deprivation* of which relator complains, so far as his contention can be gathered from the affidavit or petition, consists in the fact that a part of his improvements are included in the strip which the constitution reserves from sale, or, as stated in the affidavit, a part of his improvements are "included within the harbor lines."

We think that relator misapprehends the meaning of the term "harbor line" as used in the constitution. The term "harbor line" manifestly refers to the line which indicates the limit beyond which wharves and other structures must not be extended. The so-called "inner

harbor line" is not a harbor line at all but merely a mark placed on the plat by the engineer to indicate approximately the inner boundary of the strip which the constitution reserves from sale. This inner line which is six hundred feet distant from the harbor line crosses the outer end of relator's wharf. The situation will be better understood by consulting the printed plat appended to this brief, from which it will be seen that the "harbor line" nowhere approaches relator's wharf nearer than several hundred feet. The act of which relator complains, therefore, is the order of the commissioners determining the width of the reserved strip rather than their action locating the harbor line.

How this act of the commissioners "*deprives*" relator of his property is difficult to see, even if it were conceded that he is the absolute owner of the wharf and the soil upon which it stands.

It is not pretended that the commissioners have so much as attempted to set foot upon this wharf, nor is there any provision of law as yet which authorizes any officer of the state to take possession of any part of the reserved area, nor is there any provision of law as yet which even authorizes the leasing of any part of said area.

Relator is in no wise disturbed in his possession or use of the wharf, nor has the legislature considered that question, even to the extent of making any police regulations respecting that strip.

The people have simply prohibited the legislature from selling it. In passing, it may be remarked that one of the grievances set forth in the affidavit is, that relator would be entitled to purchase the ground occupied by his

improvements under the act of March 6, 1890, if defendants had not determined the width of the reserved strip so as to include a part of the space occupied by him. This contention is too trifling to deserve notice further than to say that if the legislature of the state has power to provide for the sale of a part of the tide lands, the people of the state can certainly reserve a part of them from sale, and can delegate to such tribunal as they see fit the discretion of determining what part shall be reserved.

This claim of the right to purchase the area occupied by his wharf from the state would seem to dispose of relator's case; for if the state has the right to sell the shore to him it has the power to require him to pay for it, and if he declines to pay for it the state may certainly sell it to a stranger or take possession of it for the public, which would be going much further than any act defendant contemplates.

The "*property*" of which relator contends he is "*deprived*" by the action of the defendants is—

1. Private rights of property in the improvements included within the reserved area, by virtue of an act of the territorial legislature of 1854, known as the "wharf act." (See Laws 1854, p. 357.) Also under an act of the state legislature of 1890, known as the "tide land law." (See Laws 1889–90, p. 431.)

2. A private right of access to the navigable waters of Elliott Bay.

3. A private right to construct a wharf from his own land to the navigable waters of the harbor.

The first right asserted by relator is based upon local statutes of the Territory and State of Washington, respectively, and have both been construed adversely to the claim of relator by the highest court of the state. See —

Eisenbach vs. Hatfield, 2 Wash. 236.

Pierce vs. Kenneday, 2 Wash. 324.

Yesler vs. Prosser et al., 3 Wash. 530.

Stimson Mill Co. vs. Commissioners, 29 Pac. Rep. 938.

And in view of the well established principle that the construction placed on local laws by the highest court of a state will be followed by this court, it is assumed that relator will not ask this court to construe those statutes differently.

The second and third classes of property asserted by relator, viz., the general riparian or littoral right of access and wharfage are not based upon local statutes, but they are nevertheless questions purely of local law, and have uniformly been so treated by this court.

One of the latest expressions of this doctrine is to be found in the case of *Hardin vs. Jordan*, 140 U. S. 371, in which the court says:

"The right of the state to regulate and control the shores of tide waters and the lands under them is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania to all the permanent rivers of the state; but it depends upon the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

In that case the court sought simply to determine what was the law of Illinois, a question on which the court was not unanimous, Justices Brewer, Gray and Brown dissenting as to the law of Illinois. And Justice Brewer, in writing a dissenting opinion, uses the following language:

"Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of the highest court furnish the best and the final authority."

In the case of *Mumford vs. Wardwell*, 6 Wall. 436, the court says:

"The settled rule of law in this court is, that the shores of navigable waters and the soils under the same in the original states were not granted by the constitution to the United States, but were reserved to the several states; and the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders."

And in *Pollard vs. Hagan*, 3 How. 230, the following language is used:

"To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty and deprive the states of the power to exercise a numerous and important class of public powers."

In *Huse vs. Glover*, 119 U. S. 546, the court uses this language, in speaking of the State of Illinois:

"On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original s[illegible]s."

Again, in *Webber vs. Harbor Commissioners*, 18 Wall. 65, the same court says:

"Upon the admission of California into the union upon equal footing with the original states, *absolute property in and dominion and sovereignty over* all soils under the tide waters within her limits passed to the state."

In *Withers vs. Buckley*, 20 How. 84, 93, the same court says:

"Clearly, congress could exact of a *new state* the surrender of no attribute inherent in her character as a sovereign, independent state or indispensable to her equality with her sister states, necessarily implied and guaranteed *by the very nature of the federal compact.* Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, water courses and highways situated within the state."

Again, in *County of St. Clair vs. Livingston*, 23 Wall. 68, the court says:

"By the American Revolution the people of each state in their sovereign character acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the states respectively; and *new states* have the same rights of sovereignty and jurisdiction over this subject as the original ones."

See also—

McCready vs. Virginia, 94 U. S. 391.
Packard vs. Bird, 137 U. S. 661.
Barney vs. Keokuk, 94 U. S. 394.
Willson vs. Blackbird Creek Co., 2 Pet. 245.
Gilman vs. Philadelphia, 3 Wall. 713.
Rundle vs. D. & R. Co., 14 How. 80, 93.
Hoboken vs. R. R. Co., 124 U. S. 656.

The foregoing authorities would seem to settle the law in this respect so conclusively that any further citation of authorities would be superfluous. But in view of the importance of this question to the people of the State of Washington and the great value of the property involved in this litigation, we trust that the court will not consider it out of place to show briefly the powers exercised over this class of property by the crown and parliament at common law, and by numerous of the states of the union.

At common law the title to the shores and beds of navigable waters in England was vested in the crown, and prior to the time of Magna Charta this title was absolute and uncontrolled, but since then has been so far qualified that the king, without parliamentary sanction, could not make a valid grant of it.

Lewis on Eminent Domain, secs. 77, 85.
Gould on Waters, secs. 21, 93, 167.
Wood's Law of Nuisances (2d ed.), sec. 468.
Pollard's Lessees vs. Hagan, 3 How. 212.
Mayor vs. Eslava, 9 Porter (Ala.), 577.
Mumford vs. Wardwell, 6 Wall. 423.
Webber vs. Harbor Commissioners, 18 Wall. 57.
Bell vs. Gough, 3 Zab. (N. J. L.) 624.

No person without the license of the king or parliament could erect any structure whatever below high water mark. If such a structure were erected without a license, and it amounted to an obstruction to navigation, it was a public nuisance, and might be abated by indictment. If it did not amount to an obstruction to navigation, it was a pur-

presture, and the king could abate, seize or demolish it at his pleasure.

Gould on Waters, secs. *supra.*
Wood's Law of Nuisances, sec. 468.
Thornton vs. Grant, 10 R. I. 477, 480.
Lewis on Eminent Domain, secs. 71, 72.

In short, the foregoing doctrine is supported by so overwhelming a chain of authorities that its discussion seems idle; yet parliament has always had the power to make an absolute grant of the beds of navigable waters to a stranger without regard to any pretended conveniences or rights of the riparian proprietor in front of whom the shore was appropriated by parliamentary authority.

Abraham vs. The Great Northern Railroad, 5 English Law and Equity, 258.

The law applicable to this class of questions is so admirably stated by Mr. Wood, in section 468 of his work on Nuisances, that we feel justified in quoting that section at length:

"The state is the owner absolutely of the alveus of the stream to high water mark, and as such owner may devote the stream, or any part thereof, to such purposes as it sees fit, so long at it does not materially obstruct navigation. Riparian owners, as such, upon this class of streams, have no more rights than any other member of the public, either in the stream or any of the lands covered thereby. They cannot erect a wharf thereon, or use any portion of the alveus of the stream for any purpose whatever, except in the exercise of the common right of navigation. They may cross and recross the same for the purpose of reaching the sea: so may any other member of the public. They may use the waters of the

stream for ordinary domestic purposes, and so may any one else. The owner of the bank has no *jus privatum* or special usufructuary interest in the water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the water more readily, and over lands which the public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high water mark, and does not prevent the state from depriving him entirely of this convenience by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is '*damnum absque injuria.*' Thus, the state may authorize the erection of wharves, or the construction of embankments for railroads on the shore of tidal streams, or its use in any way that does not directly trench on the land itself of the riparian owner."

And Mr. Lewis, in his work on Eminent Domain, at section 85, states the law in the following language:

"Those states which hold the doctrine of the absolute title of the public to public waters, of course, deny any redress for injury to riparian rights, for the reason that they do not recognize the existence of such rights. It has accordingly been held in such states that the waters of a public stream or public pond may be taken to supply a city with water without compensation to the riparian owner. Also, that interfering with a fishery by a wall or wharf, destroying a fording by deepening a public river, the converting of a private wharf into a public one, or the building of public wharves in front of private property, to be owned and controlled by the public, are things which may be done without compensation to the riparian owner."

And we think that an examination of the following authorities will show that every state in the Union which has had occasion to act upon this question has assumed that it had absolute control over the shores and beds of its navigable waters, unrestrained by anything in the federal constitution, or any claim on the part of riparian proprietors which was not based upon the law of the particular state in which the case arose.

In Maine the title of the riparian owner extends to low water mark, by virtue of the colonial ordinance of 1647, and yet the state cuts him of from access to the navigable water by authorizing the construction of a dam across a cove, and between his land and the sea, and declines to allow him any compensation for the alleged injury thus occasioned.

Parker vs. Cutler Mill Dam Co., 20 Me. 353.

It also excludes him from the navigation of the river by granting the monopoly thereof to a stranger, and denies him any compensation for any injury occasioned by the construction of a dam, rendered necessary in the improvement of the river.

Moor vs. Veazie, 31 Me. 360.

The court of that state, in *Parker vs. Cutler Mill Dam Co.*, 20 Me. 357, says:

"The regulation of the navigable waters within the state is vested in the sovereign power, to be exercised by laws duly enacted. The navigation may be impeded, if in the judgment of that power the public good requires it. And if the more apparent object be the profit of a grantee, it is its right and duty to determine whether the public interest is so connected

with it as to authorize the grant. To refuse it this right would be prevent the union of public and private interests for the accomplishment of any object.

"The jury have found that the dam was erected across the head of Little River harbor; the corporation is not therefore liable for any injury which the plaintiff may have suffered by obstructions to the navigation by altering the flux and reflux of the tide. This will embrace the flowing of the beach complained of as an injury to the plaintiff in repairing vessels; the alleged injury to his mill site by retaining the tide water; and the increased difficulty in navigating the river occasioned by the flood gates. * * * The colonial ordinance of 1641 extended the right to the riparian owner in the soil from high to low water mark, where it did not exceed one hundred rods. But this was a qualified right to use the interest granted in such a manner as not to *interrupt the rights of the public, as secured by this ordinance. The right of navigation was expressly reserved. And the right of each householder to have free fishing, so far as the sea ebbs and flows, has been in the same ordinance declared.* It was the policy of the colonial legislature, instead of granting away any portion of the public right of fishery, to extend and enlarge it."

New Hampshire bases his right below high water mark upon the colonial ordinance of 1647, which, though never adopted as positive law, has obtained the force of law by a long acquiescence and custom.

Clement vs. Burns, 43 N. H. 609, 621.

In Massachusetts his title extends to low water mark by virtue of the colonial ordinance of 1647, and it is held that he only takes to high water mark by virtue of any grant made prior to the passage of that ordinance (*Commonwealth vs. Roxbury*, 9 Gray, 451), and Justice Gray, in his elaborate note to that case, shows that the people of that colony did not pretend to have any right to erect a wharf, or, hav-

ing erected one, to charge any wharfage, without express authority from the sovereign of that jurisdiction (see notes to same case, p. 514 *et seq.*); in which the learned jurist seems to have made a most elaborate and exhaustive research of the history of the ordinance of 1647, and of the condition of titles prior to that time. He says:

"In the earliest times of the colony, before the passage of any ordinance on the subject, wharves were built by the proprietors of land bounding on the sea, *by the permission or authority of the towns, and with the approval of the general court.* The earliest order of this kind appearing in the Boston Town Records, is one of January 21, 1638–39, by which 'there is granted to the owners of the wharfe and crayne an hundred acres of land at Mount Woolystone, next to the allotments already granted, toward the repayring and mainteyening of the said wharfe and crayne.'"

1 Boston Town Rec. 27.

On the 25th of May 1640—

"Mr. Edward Ting is granted to digg turfe of the island lieing among the flats by the mill feild going to Charlestowne."

1 Boston Town Rec. 45.

On the 6th of October, 1641—

"Francis Willoughby, Edward Tinge and Edward Bendall presented a petition to the general court, representing that they 'have beene att greate costs and charges, to the espense of a greate parte of our estates, in erecting warehouses and framing of wharfes with many other necesearyes, for expeditings and safe landinge of such commodetyes and goods as come (not onlye from about home, but alsoe) from further partes, expedient and useful according to our hopes and intentions for the publique good,' and praying in court 'to appoynte unto us a certaine rate for wharfage, porterage and howsing of goods; that having your worship's authoretye for

our demands and dues in this case by this honored corte provided, we may not (justlye) offends anye by our owne demande.' On this petition the general court appointed a committee 'to settle the rates of wharfage, porterage and warehouse huire, and certify at the next general court, and the order to stand the meanwhile; * * * all their owne goods, wood, timber and other things being originally in this jurisdiction without any charge; and such warehouses or other houses as they shall erect during their terms they shall be allowed for by the towne after such rate as they shall be valued to be their worth, without respect of the place;' and 'such wharfes as they shall make there they shall leave in good repair, and so that they may be of use to the towne at the end of time;' and also 'sufficient wharfe, and from time to time keepe in repaire the creeke next unto George Burden's house fitting for the lading and unlading of lighter of twenty tunne in ordinary tydes on either side thereof.' * * * The legislature may, without compensation, prohibit the taking of gravel from a beach, or building upon flats, whenever in their opinion such prohibition would benefit navigation. * * * The owner of flats has no right, either against the commonwealth or against coterminous proprietors, to have his flats kept open for the ebb and flow of the tide, either for tide mills or for navigation; but only to the flow of the water below low water mark, and to *some access* thereto."

See also Pub. St. Mass. Ch. 19, 1882.

Massachusetts also holds that it is competent for the authorities of the state to extend a harbor line across flats the title to which is confessedly in the riparian proprietor, by virtue of the colonial ordinance heretofore referred to, and for infringing upon the limitation thus set upon his right to wharf out, punishes him by indictment and fine.

Commonwealth vs. Alger, 7 Cushing, 53.

In Rhode Island his right to extend his possessions by any extraneous additions to the upland is based upon the colonial ordinance of 1701 (*Clement vs. Burns, supra*), and by virtue of immemorial usage, long acquiesced in by the people, the legislature and the courts.

Steam Engine Co. vs. Providence Steamship Co., 12 R. I. 348.
Bowden vs. Lewis, 13 R. I. 189.

And the court distinctly asserts the paramount power of the legislature to withhold such privileges if it saw fit (*Thornton vs. Grant*, 10 R. I. 484–486), and still asserts its right to lease the shore in front of the upland owner to a stranger, and punishes him in damages for tearing down a structure erected by such stranger in violation of law, and not for the purpose of commerce.

Clark vs. Peckham, 10 R. I. 35.

Connecticut asserts her right to forbid erections in her harbors, and to license the privilege of charging tolls for the use of private wharves.

Union Wharf Co. vs. Hemingway, 12 Conn. 293.
Statutes regulating New Haven harbor, General Statutes 1888, secs. 3243, 3244 and 3257.

New York utterly repudiates all pretensions of the upland owner, and says he has no greater rights than any other member of the public.

Gould vs. Hudson River R. R., 6 N. Y. 522.
Furmon vs. Mayor, 10 N. Y. 567.
Revised Statutes, pp. 2252, 2281, 2282.
Langdon vs. The Mayor, 93 N. Y. 129.

New Jersey asserts her power to require the riparian owner to purchase the privilege of constructing a wharf, or any other addition to his uplands, and asserts the right to grant the same to a stranger, in case he does not see fit to avail himself of his permissive right (*Stevens vs. Paterson & Newark R. R. Co.*, 5 Vroom [34 N. J. L.], 532), and the supreme court of the United States distinctly recognizes her power to do so.

Hoboken vs. R. R. Co., 124 U. S. 656.

Section 15, Revision 1887, p. 66; also secs. 1–14. See also N. J. Revision of 1887, p. 980.

Delaware erects a dam across a navigable arm of the sea, in which the tide ebbs and flows without reference to the right of access of the riparian proprietor, and the supreme court of the United States recognizes the validity of her acts.

Willson vs. Blackbird Creek Marsh Co., 2 Pet. 245.

Pennsylvania, while admitting that by the law of that state the riparian owner owns the shore to low water mark, denies him any right to erect any kind of a structure below the line of ordinary high tide without express authority from the state, or having erected a structure, to charge any tolls for its own use by a stranger unless authorized by the state to do so.

Tinicum Fishing Co. vs. Carter, 61 Pa. St. 21.

Rundle vs. D. & R. Canal Co., 14 How. 80, 93.

Virginia deemed it necessary to make an express legislative grant, to enable the riparian owner to construct a wharf in front of his own land (*Ravenswood vs. Fleming*, 22 W. Va. 52; 46 American Reports, 497), and has always asserted the right to exercise her sovereign control over the beds, shores and banks of all navigable waters, even to the extent of prohibiting a riparian proprietor to take an oyster from the shore in front of him unless he is a citizen of the state.

McCready vs. Virginia, 94 U. S. 391.

West Virginia utterly repudiates the pretensions of the riparian owner, and in support of the public policy demanding that construction of law, the supreme court, in *Ravenswood vs. Fleming*, 46 American Reports, *supra*, on page 499, says:

"We have seen that the Ohio river is a public highway, and according to the overwhelming weight of authority, according to the statutes and decisions of the state of Virginia, the riparian owners of land on its banks have no title as against the state beyond ordinary high water mark, and that the title to the bed, the shores and banks to ordinary high water mark is now in the State of West Virginia for the use of the public. The conclusion is absolutely necessary to properly preserve for the people the free navigation of that great highway. If each riparian owner had the right to build a wharf of his own, and to deny the right of any one to land there without paying tribute to him, or to deny him the right to land at all on land adjacent to his farm or lot, the navigation of the river could not in any sense be free."

South Carolina, by her constitution, art. 1, sec. 40, declares that—

"No * * * wharfage shall be imposed, demanded or received for the use of the shores or any *wharf erected* on the shores, or in or over the waters of any navigable stream, unless the same be authorized by the general assembly." (Const. 1882.)

And her courts (*Fuller vs. Edings et al.*, 11 Rich. [S. C.] 239), under a statute providing compensation "for the value of the premises taken for public use as well as for the *damages generally to the same*," held that the riparian owner whose land was taken for a public wharf was not entitled to compensation for the damages he might sustain for the loss of income from his private wharf.

Florida in 1856 deemed it necessary to pass an act, the preamble of which is as follows:

"Whereas, it is the benefit of commerce that wharves be built and warehouses erected for facilitating the landing and storing of goods; and whereas, *the state being the proprietor of all submerged land and water privileges within its boundaries which prevent the riparian owner from improving their water lots, therefore, etc.*"

Could any more emphatic declaration of the absolute power and control of the state over the shores of its navigable waters be made by the people, through their legislative representatives, than this?

Alabama holds that even the United States has no power to make a grant of any interest in the shore of the ocean.

Mayor vs. Eslava, 9 Porter, 577, *supra*.

And that state (Alabama), by her constitution, adopted in 1875, sec. 25, art. 1, declared in her bill of rights as follows:

"No tax, toll, impost of *wharfage*, shall be demanded or received from the owners of any merchandise or commodity for the use of the shores or any *wharf erected* on the shores or in or over the waters of any navigable stream, unless the same be expressly authorized by law."

And the supreme court of the United States, in *Pollard's Lessees vs. Hagan*, commend the good sense of the Alabama court; and in *Barney vs. Keokuk* express a distinct approval of the stern assertion of public rights by the supreme court of the state of Iowa in repudiating the pretensions of the riparian owner.

Mississippi asserts her absolute jurisdiction over the shores of her tide waters, to the exclusion of any claim of the riparian proprietor, by authorizing a municipal corporation to take entire control of the water front; and pursuant to authority derived from such corporation, the courts maintain the right of a license of the municipality to build a wharf in front of the upland of another without his consent and against his objections.

Martin vs. O'Brien, 34 Miss. 21.

Louisiana, while apparently acquiescing tacitly in the building of a wharf by the riparian proprietor, declines to consider him in any way damaged by the conversion of his private wharf into a public one, and asserts that the shores of the Mississippi belong to all the people, and not to individuals, and that it is the duty of the public to take possession of all the shores whenever the public demands require it.

Hart vs. The Mayor, 10 La. Annual, 171.

The court says, on page 173:

"It is impossible to perceive upon what grounds the action of the town council can be made the foundation of the claim for damages against them. It is true they did not object to the erection of the plaintiff's wharf; but this did not give to the latter the exclusive use of the bank of the river covered by their wharf. *The banks of the Mississippi river are public property, subject to be used indiscriminately by the public at large.*"

The constitution of Texas, art. 1, sec. 17, p. 504, is as follows:

"No person's property shall be taken, *damaged* or destroyed for or applied to public use without adequate compensation," etc.

By her laws, sec. 4436, Sayles Stat. 1889, she gives the riparian proprietor preference right to operate a ferry, but prohibits him charging any tolls unless he has license so to do (sec. 4437). And regulates his charges (sec. 4440). And if he declines to operate the ferry at reduced rates, she gives the license to any one who will take it (sec. 4442).

See also *Galveston vs. Menard*, 23 Texas, 349.

California assumes absolute and complete control over all her shores and navigable waters, and asserts her power and right to grant the privilege of erecting a wharf to a stranger in front of property owned by a third person (see sec. 2906, Deering's Political Code, and following sections), and clearly indicates, in section 2917, that where the riparian proprietor has erected a wharf, even with a license from the state, he has no power to collect any wharfage, except-

ing by a further license under authority of the legislature. The validity of this law is expressly affirmed in *Templeton vs. Coburn*, 48 Cal. 563. True, California has licensed riparian owners to build wharves under certain restrictions, excepting in front of the city of San Francisco, but this, instead of being an argument in favor of the right at common law, is conclusive evidence that it does not exist. The supreme court of that state, in *People vs. Davidson*, 30 Cal. 393, after setting forth the power of the king at common law to seize or demolish a purpresture, says: "The state, in case of mere purpresture, has the same power in respect to its tide lands." Again, in the case of *Coburn vs. Ames*, decided by that court in 1877 (52 Cal. 397), the court says:

"It is well settled in England that the *title* in the bed of the ocean is in the sovereign subject to the *jus publicum* the right of navigation and fishery. * * * If the soil in this case belongs to the state—and such is the theory of the bill—then the wharf, if erected, will belong to it also. The defendants will be unable to collect wharfage, and will have no rights except those belonging to the public at large. Possession of the land and wharf, should it be withheld, can be recovered in ejectment, and thereafter the wharf can be managed by the state according to its own views of public good."

And while, as before said, the riparian owner is authorized by positive law in California to wharf out, providing he does not interfere with navigation, the court holds that he cannot prevent a stranger from so doing if he does not see fit to construct a wharf himself, and in this connection the court says, p. 398:

"In this state there are numerous large landed estates, held in private ownership, which front for many miles on the shore of the ocean, and on navigable bays and inlets within the ebb

and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers and wharves which are necessary for the convenience of commerce, nevertheless, in virtue merely of his riparian rights, might maintain ejectments for all such structures erected by others, which, when recovered, he might either demolish or cease to use in aid of commerce, it is not difficult to foresee the disastrous consequences which would result from such a doctrine. It results from these views that the court below erred in including in the judgment for the plaintiff the wharf and chute below high water mark."

The case of *Shirley vs. Bishop*, 67 Cal. 543, is cited as a modification of this doctrine, but it appears that in that case the plaintiff's right was founded upon express license by positive law. From this it seems that California, like all the other states, had the full power to make such laws as it deemed fit, and the State of Washington has the same power as the State of California.

Oregon asserts the absolute proprietorship of the state to the shores and beds of her navigable waters (*Hinman vs. Warner*, *supra*), and authorizes the construction of a bridge across a navigable stream against the protest of persons owning wharves above such structure.

Willamette Bridge Co. vs. Hatch, 125 U. S. 1.
Bowlby vs. Shively, 30 Pac. Rep. 154.

In Iowa it is held that the state is the absolute owner of the shores and beds of her navigable rivers below the line of ordinary high water mark; and she recognizes no right in the riparian proprietor in such shores and beds different

from that of any other person excepting as his right proceeds from a statute of the state.

McManus vs. Carmichael, 3 Iowa, 1.
Tomlin vs. R. R. Co., 32 Iowa, 106.
Barney vs. Keokuk, *supra*.

In Wisconsin the riparian proprietor is the owner of the bed of the stream contiguous to his uplands to the middle thread thereof, but the courts of that state uphold the power of the legislature to cut a riparian proprietor off from access to the navigable waters of the stream by authorizing a corporation to construct an impassable boom in front of him (*Cohn vs. Wassau Boom Co.*, 47 Wis. 314) and by changing the channel of a river so that his access is entirely destroyed.

B. R. Improvement Co. vs. L. B. & T. Co., 54 Wis. 659.

It will thus be seen that the right of access in the riparian proprietor as against the authority of the state has been expressly denied by Maine, New York, Delaware, Pennsylvania, Mississippi, Iowa, Wisconsin and California; and that his right to wharf out excepting as authorized by state legislation has been expressly denied by all of the states above mentioned.

Tide Lands:

The claim that relator has a preference right to purchase the area covered by its improvements was necessarily involved in the case of *Yesler vs. Prosser et al.* (*supra*), but

the court did not deem it of sufficient importance to deserve mention. It will, however, be noticed that the harbor line commissioners in this case are exercising the powers conferred by and performing duties enjoined in the constitution of the state, and if any subsequent law passed by the legislature in any way conflicts with these constitutional provisions, it goes without saying that the law must yield to the constitution. In this case, however, the appellants complain that the plaintiff can insist on no rights based on the law heretofore quoted, for the reason that that law only authorizes the sale to the riparian owners of "*tide lands*," and the affidavit filed by the relator herein nowhere sets forth any facts from which it can be inferred that any of the area between the harbor line and the line indicating the width of the reserved area is "*tide lands.*"

The term "tide lands" was unknown to the law until used by the legislature of the State of California in the act of 1861. And subsequently to that date, in October, 1866, the supreme court of the State of California defined the term "tide lands" as synonomous with the word "shore," and held that the phrase only included the area which lay between the line of high tide and the line of low tide.

See *People vs. Davidson*, 30 Cal. 379.

This term having been borrowed from the law of California subsequently to the date of its construction by the supreme court of that state, must be deemed to have been used by the legislature of the State of Washington in the same sense and with the same meaning that it acquired by judicial construction in the state from which the phrase was borrowed. Indeed, the same legislature which enacted the provision heretofore quoted defined the term "tide lands"

in section 6 of the act of March 28, 1890, providing for public ways across tide flats near towns.

See Laws of 1889–90, page 372.

That section is as follows:

"Where the words 'tide flats' or 'tide lands' are used in this act they shall be construed to mean all lands over which the tide ebbs and flows, and which is bare at low tide," etc.

The relator having failed to show that any of the area in dispute is of the character which the law authorizes the riparian or littoral proprietor to purchase, can maintain no rights in this action by virtue of any provision of that law.

It is assumed that plaintiff in error will cite cases showing that some of the states have "resigned to riparian proprietors rights which properly belong to themselves by virtue of their sovereignty," as is said by the court in *Barney vs. Keokuk.*

But plaintiff's rights in this case must be determined, not by the rights accorded to littoral proprietors in other states, but by the rule adopted by the people, the legislature and the courts of our own state.

In most of the states of this union the riparian proprietor on a non-navigable stream has the right to have the water of the stream flow past his land, unimpaired in quality and undiminished in quantity, but this fact is no argument against the irrigation laws of Colorado or Washington, which entirely abrogate the rights and privileges accorded to the riparian proprietor by the common law.

These are local questions which each state must settle for itself.

And it is wholly immaterial to the discussion of this case that Massachusetts recognizes the littoral proprietor's title

to the line of low tide, or Pennsylvania to low water mark on navigable streams, or Illinois and Wisconsin to the middle thread of such streams, or that the parliament of Great Britain, by the lands clauses act of 1845, provided for compensation to the riparian owner for any action of the conservators whereby his property was "injuriously affected," or that the house of lords decided that constructing a highway on the banks of the Thames river, so as to deprive him of access and his natural opportunity to wharf out "injuriously affected" his property.

It is enough that any of these sovereignties had the power to have adopted a different rule.

Due Process of Law:

Assuming that the alleged rights of relator under the "wharf act" and "tide land act" and his supposed riparian rights of access and wharfage are "*property*" within the meaning of the fourteenth amendment to the federal constitution, and that the acts of the harbor line commissioners will *deprive* him of such property, it is contended that he is deprived of his property without "due process of law," because no provision is made for compensating him for the property so taken, and it is insisted that compensation for private property taken for public use is a necessary ingredient of due process of law; and the case of *Scott vs. Toledo*, 36 Fed. R. 385, is relied on to sustain this position. The learned judge who decided that case does use language which could be construed to sustain that contention, but when this amendment to the constitution is construed in connection with the fifth amendment, and the interpretation placed upon those two amendments by this court, we con-

tend that such a conclusion cannot be reached. When the states adopted the fifth amendment, which was designed to impose limitations upon the power of the general government, it used the following language:

"No person shall * * * be deprived of life, liberty or property without due process of law, *nor shall private property be taken for public use without just compensation.*"

The framers of this section, and the states which adopted it, evidently understood that the limitations upon the power of the general government to deprive a citizen of life, liberty or property without due process of law did not amount to a guaranty that private property should not be taken for public use without compensation; otherwise, the last clause in that amendment would have been entirely superfluous and the former words would have been sufficient to satisfy the apprehensions of the several states. When the fourteenth amendment was adopted by the several states, the fifth amendment was before them, and it must be presumed that the framers of the latter article were familiar with the former. They were willing to limit the power of the states by providing that no state shall deprive any person of life, liberty or property without due process of law, but they declined to follow the fifth amendment further and say that private property shall not be taken by the state for public use without compensation. Again, the word "property" in the fourteenth amendment is used in connection with the words "life" and "liberty," and the state is prohibited from depriving any person of life, liberty or property without due process of law. And the conclusion is irresistible that the states, in adopting this amendment, intended to throw the same safeguards

and only the same safeguards about property that they did about life and liberty. And if compensation can be held to be a part of due process of law without which property cannot be taken by the states, how can we fail to reach the conclusion that life and liberty are equally protected, and that a state cannot deprive an individual of either one without just compensation; a conclusion which, to say the least, would be absurd.

This question was also considered by the supreme court of the State of Washington in the case of *Yesler vs. Prosser et al.*, *supra*, and it was held that the acts of the harbor line commissioners did not *deprive* the plaintiff of any property, and that the plaintiff did not have any rights, interest or property in his improvements on the shore of the waters of the state which was capable of being clouded by any act of the harbor line commissioners. But if the relator had all the rights, title and property in the area in dispute which he claims, and the acts of the harbor line commissioners amounted to *depriving* the plaintiff of its property, it is impossible to see how the acts of the harbor line commissioners are wanting in any element essential to *due process of law.* The constitution and the laws under which they acted were duly enacted long before the first step was taken towards locating a harbor line in front of the city of Seattle. This constitution and these laws affected all persons and all property similarly situated, in exactly the same manner; and so far as the laying of the harbor lines and the defining of the reserved area is concerned, it is not pretended but that the commissioners are acting strictly in pursuance of the constitution and the laws. And the provision of the fourteenth amendment upon

which the plaintiff relies was only intended to prohibit the state from depriving any person of life, liberty or property, excepting through the operation of laws theretofore ascertained and which operate upon all persons similarly situated in the same manner. In the case of *Walker vs. Sauvinet*, 92 U. S. 90, the court says:

> "Due process of law is process due according to the law of the land. This process in the state is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States."

The fourteenth amendment was not designed to define due process of law, nor to add to or take from its ordinarily accepted meaning any qualification or limitation. If there was any other provision of the federal constitution prohibiting any state from taking private property for public use without compensation, then it might logically be contended that due process of law required compensation to be made for private property taken for public use. But this is not the case. The fifth amendment, guaranteeing to the citizen that private property shall not be taken for public use except upon just compensation, only applies to the United States, and not to the states.

Barron vs. Baltimore, 7 Pet. 243.
Holmes vs. Jennison, 14 Pet. 540, 582.
Fox vs. Otis, 5 How. 410, 434.
Smith vs. Maryland, 18 How. 71, 76.
Withers vs. Buckley, 20 How. 84, 90.
Pervear vs. Mass., 5 Wall. 475, 479.
U. S. vs. Cruikshank, 92 U. S. 542, 552.
Presser vs. Ill., 116 U. S. 252, 265.

The fourteenth amendment was not intended to in any way limit or impair the power of any state to deprive a person of life, liberty or property, but only to guarantee to the citizen that he should not be deprived of life, liberty or property except in pursuance of the law of the state. It does not extend to the citizen any new right, nor impair any right which he had heretofore. Nor does it guarantee to him that he shall not be deprived of any right which he now has by the state, but simply specifies in general terms the manner in which it must be done. It cannot be done capriciously; it cannot be done wantonly; it cannot be done by the exercise of the powers of the state acting without the sanction of its laws. Its main purpose was to protect the newly emancipated slave, and to enable him to appeal to the federal courts for redress when the state sought to deprive him of life, liberty or property, not in pursuance of the law of the state, but in violation of it. In the case of *United States vs. Cruikshank*, *supra*, this court says:

"The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society, * * * and secures the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

See also Miller on the Constitution, p. 664, *et seq.*

Prior to the adoption of the fourteenth amendment, the state had full power to deprive a citizen of property without compensation (*Barron vs. Baltimore*, *supra*), except

as it was restrained by its own constitution. And the only change made in the status of the state by that amendment is, that while prior to its adoption the state might deprive him of his property without compensation and without due process of law, it can now deprive him of property only in pursuance of laws duly enacted and in accordance with the usual form of procedure. It is not pretended that the acts of the harbor line commissioners in this case do not fully comply with these latter limitations.

In the case of *Scott vs. Toledo*, *supra*, it will be noticed that the constitution of the State of Ohio provides that compensation for property appropriated to public use must be first made in money, or first secured by deposit of money, and that it shall be assessed by a jury, without deductions for benefit to the property of the owner, and further provides that—

"No right-of-way shall be appropriated to the use of any corporation until full compensation therefor has been made in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law."

In that case the city of Toledo sought to take the property of the plaintiff for a public street, not in accordance with the constitution of that state, but in direct violation of its provisions, and it is wholly unnecessary to question the correctness of the decision of the learned judge who decided that case, in holding that due process of law in the State of Ohio required compensation to be first made for property appropriated for public use. In that case there was no question but that the city of Toledo sought to

"*deprive*" the plaintiff of his property, and in holding that the constitution of the State of Ohio prohibited the taking of property in the manner sought to be pursued by the city of Toledo, the learned judge did not ignore or disregard any decision of the supreme court of that state, construing its own constitution and laws. What is subsequently said by the court in that case with reference to the restraining influence of the fourteenth amendment, generally, was wholly unnecessary to the decision of the cause, and was not really involved in the case. His argument on this branch of the case can be regarded only as *dicta*, and entitled to no greater respect as authority than the opinion of any other eminent lawyer. And the conclusion which he reaches is certainly not in harmony with the definition of "due process of law" as given by that eminent jurist, the late lamented Justice Miller, on page 664 of his valuable work on the constitution, in which he defines it as follows:

> "Law, in its regular course of administration through the courts of law, is due process of law, and when it is secured by the law of the state the requirements of the fourteenth amendment are satisfied. Due process of law, within the meaning of that amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In the present case, however, it is difficult to see on what theory the plaintiff can consistently claim that the action of the harbor line commissioners in locating the harbor line and filing the plat in any way prejudices or injuriously affects any of its rights, privileges, properties or franchises, even conceding that it has all the rights and property in the area in dispute that it claims. Or even if

it should be held that the plaintiff is the absolute owner of all that area, and that the state has no interest whatever in the shores and beds of its navigable waters, the harbor line which the defendants have located, and it is the only line which they have attempted to locate, or which the law authorizes them to locate, is entirely in the navigable waters of the city of Seattle, and does not even touch any improvements whatever which the plaintiff has erected or maintains. Its design, as outlined by the constitution, is simply to prohibit the unreasonable encroachment by private individuals and corporations on the navigable waters of the harbor, and to secure a uniform water front, so that commerce may have the full benefit of all the wharves erected to accommodate traffic.

From the authorities heretofore cited it is seen that nearly every state in the union having any tide water harbors, and some states which do not have tide water harbors, have located such lines and compelled the proprietors of wharves to comply with their regulations. The location of such lines is manifestly an exercise of the police power of the state, the design of which is to benefit the entire public.

There is no pretense that the defendants have threatened in any manner to disturb plaintiff, even in its possession of the property of the state, nor do all the allegations of the complaint taken together state any fact from which it can be inferred that the action of the defendants will have a tendency to produce that effect, or that any of the defendants have any such intention whatever.

It is further contended that the action of the commissioners is illegal because it concerns a matter now within the exclusive jurisdiction and control of the government of the United States. The particular provision of law which it is contended now deprives the states of the powers which they heretofore had to regulate and control the navigable waters of their harbors, is section 7 of the so-called river and harbor bill heretofore referred to; also section 12 of the same act. The first of these sections denounces a penalty against any person who shall build any wharf, pier, dolphin, jetty, etc., in certain navigable waters of the United States without permission of the secretary of war. The second section provides generally for the location of harbor lines by the secretary of war. It is contended that these two sections make it unlawful for the harbor line commissioners of this state to make a picture of the harbor of Seattle such as this plat is. With respect to this contention we are unable to see what standing this relator has in a court of equity to conserve the penal laws of the United States. If these defendants are violating any law of the United States whereby a penalty is incurred, the general government is unquestionably capable of protecting itself and vindicating its own laws. It has a court, a prosecuting attorney, and a grand jury at its command in the State of Washington, with all the machinery and officers necessary to fully protect its own interests and punish for the violation of its laws. This is probably the first attempt that has ever been made by a private citizen to restrain public officers or other persons from violating a penal law which does not concern him any more than it does any other member of the public, and that by the ex-

traordinary remedy of a writ of prohibition. Finally, it is conceded by the plaintiff in error, or at any rate it has heretofore been so conceded by him, that the state is the absolute owner and proprietor of the shores and beds of all its navigable waters, but it is difficult to see of what practical value such ownership is to the state, or to the public if the officers of the state may be enjoined from proceeding with the investigations, making the surveys, and adopting even a plan for the future improvement of its harbors.

Respectfully submitted,

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